

1 The last point I will address on the release, Your Honor,
2 is who is being released and why and what does the evidence
3 show. The Debtor release extends to release parties which
4 include the independent directors, Strand, for actions after
5 January 9th, Jim Seery as the CEO and CRO, the Committee,
6 members of the Committee, professionals, and employees.

7 You have heard Mr. Seery's testimony that the Debtor does
8 not believe that any claims against the parties that are
9 proposed to be released actually exist. You have heard Mr.
10 Seery's testimony that he worked closely with the employees
11 and believes that not only have they all been instrumental in
12 getting the Debtor to the -- be on the cusp of plan
13 confirmation, but that also Mr. Seery is not aware of any
14 claims against them.

15 Moreover, as Mr. Seery testified, the release for the
16 employees is only conditional. He testified that the
17 employees are required to assist in the monetization of assets
18 and the resolution of claims, and if they do not like -- if
19 they do not lose their release, then any Debtor claims are
20 tolled, such that could be pursued by the Litigation Trustee
21 at a future time.

22 Lastly, I'm sure that the Dondero entities will argue that
23 someone needs to investigate claims against Mr. Seery for
24 mismanagement or for, God forbid, having failed to file the
25 2015.3 statements. Such claims are part of the continuing

1 harassment of Mr. Seery that the Dondero entities have
2 embarked on after it was apparent that nobody would support
3 their plan.

4 There is no evidence of any claims that exist, Your Honor.
5 In fact, the Committee and its professionals have watched the
6 Debtor through this case like a hawk. They have not been
7 afraid to challenge the Debtor's actions in general and Mr.
8 Seery's in particular. FTI has worked on a daily basis with
9 DSI and the company, had access to information. When COVID
10 was happening, they were looking at trades going on on a daily
11 basis.

12 So if the Committee, whose members hold approximately \$200
13 million of claims against the estate, are okay with the
14 release against the independent directors and Mr. Seery, that
15 should provide the Court with comfort to approve the releases
16 as part of the plan.

17 In summary, Your Honor, the Debtor release is entirely
18 appropriate and does not affect the release of third-party
19 claims that have not yet arisen.

20 Next, Your Honor, I want to go to the discharge. There's
21 been objections to the discharge. Dugaboy and NexPoint have
22 objected that the Debtor receiving a discharge under the plan
23 -- argue a debtor is liquidating. The objection is not well
24 taken based upon Mr. Seery's testimony regarding what it is
25 the Claimant Trust and the Reorganized Debtor plan to do after

1 the effective date, as compared to what the limitations of a
2 discharge are under 1141(d)(3).

3 Your Honor, Article 9 of the -- 9(b) of the plan provides
4 that as -- except as otherwise expressly provided in the plan
5 or the confirmation order, upon the effective date, the Debtor
6 and its estate will be discharged or released under and to the
7 fullest extent provided under 1141(d)(A) [sic] and other
8 applicable provisions of the Bankruptcy Court. Bankruptcy
9 Code.

10 Section 1141(d)(3) provides an exception to the discharge,
11 and I'd like to have that section put up for Your Honor at
12 this point. Ms. Canty?

13 As this -- as the section reflects, and as the Fifth
14 Circuit has ruled in the *TH-New Orleans Limited Partnership*
15 case cited in our materials, in order to deny the debtor a
16 discharge under 1141(d)(3), three things must be true: (1)
17 the plan provides for the liquidation of all or substantially
18 all of the property in the estate; (2) the debtor does not
19 engage in business after consummation of the plan; and (3) the
20 debtor would be denied a discharge under 727(a) of this title
21 if the case was converted to Chapter 7. Here, only C applies.

22 With respect to A, Your Honor, while the plan does project
23 that it will take approximately two years to monetize the
24 Debtor's assets for fair value, the Debtor is just not
25 liquidating within the meaning of Section A.

1 As Mr. Seery testified, during the post-confirmation
2 period, post-effective date period, the Debtor will continue
3 to manage its funds and conduct the same type of business it
4 conducted prior to the effective date. It'll manage the CLOs.
5 It'll manage Multi-Strat. It'll manage Restoration Capital.
6 It'll manage the Select Fund, and it'll manage the Korea Fund.

7 The Bankruptcy Court for the Southern District of New
8 York's 2000 opinion in *Enron*, cited in our materials, is on
9 point. There, the Court found that a debtor liquidating its
10 assets over an indefinite period of time that is likely to
11 take years is not liquidating within the meaning of Section
12 1141(b) (3) (A), justifying a denial of discharge.

13 But even if we failed A, based upon Mr. Seery's testimony,
14 we would not fail B. The Debtor will be continuing to do what
15 it has done during the case, as it did before, as I said,
16 managing its business. B says the debtor does not engage in
17 the business after management. So while Mr. Seery testified
18 that it would take approximately two years, it could take
19 more, it could take less, and there is no requirement to
20 liquidate assets over a period of time.

21 Accordingly, Your Honor, the Debtor is conducting the type
22 of business contemplated by Section B so as not to just deny a
23 discharge.

24 As the Fifth Circuit said in the *TH-New Orleans* case, the
25 court granted a discharge there because it was likely that the

1 debtor would be liquidating its assets and conducting business
2 (indecipherable) years following a confirmation date. And
3 this result makes sense, Your Honor, because the Debtor will
4 need the discharge and the tenant injunctions, which I'll get
5 to in a moment, in order to prevent interference with the
6 Debtor's ability to implement the terms of the plan and make
7 distributions to creditors.

8 I would now like, Your Honor, to turn to the exculpation
9 provisions, which there's been -- there's been a lot of
10 briefing on it, and I know Your Honor is very aware of the
11 exculpation provisions and the *Pacific Lumber* case. And
12 several parties have objected to the exculpation contained in
13 the plan, based primarily on the Fifth Circuit ruling in
14 *Pacific Lumber*.

15 The exculpation provision, which is not dissimilar to what
16 is found in many plans around the country, including in plans
17 confirmed in bankruptcy courts in the Fifth Circuit, acts to
18 exculpate the exculpated parties for negligent-only acts as it
19 contains the standard carve-outs for gross negligence,
20 intentional conduct, and willful misconduct.

21 I do want to bring to the Court's attention a deletion we
22 made to the parties protected by the exculpation in the plan
23 and now -- were filed on February 1st. The definition of
24 exculpated parties included, before February 1, not only the
25 Debtor but its direct and indirect majority-owned subsidiaries

1 and the managed funds. In the plan amendment, we have deleted
2 the Debtor's direct and indirect majority-owned subsidiaries
3 and managed funds from the definition and are not seeking
4 exculpation for those entities.

5 But before, Your Honor, I address *Pacific Lumber* and why
6 the Debtor believes it does not preclude the Court from
7 approving the exculpation in this case, I do want to focus on
8 something that the Objectors conveniently ignore from their
9 argument.

10 As I mentioned in my opening argument, Your Honor, the
11 independent directors were appointed pursuant to the Court's
12 order on January 9, 2020. They have resolved many issues
13 between the Debtor and the Committee, and avoided the
14 appointment of a Chapter 11 trustee.

15 The January 9th order was specifically approved by Mr.
16 Dondero, who was in control of the Debtor at the time, and I
17 believe the transcripts that are admitted into evidence will
18 demonstrate that he was fully behind the approval of the
19 January 9th order.

20 In addition to appointing the independent directors into
21 what was sure to be a contentiously litigious case, the
22 January 9th order set the standard of care for the independent
23 directors, and specifically exculpated them from negligence.

24 You have heard Mr. Seery and Mr. Dubel testify that they
25 had input into what the order said and would have not agreed

1 to be appointed as independent directors if it did not include
2 Paragraph 10, as well as the provisions regarding
3 indemnification and D&O insurance.

4 I would like to put a demonstrative on the screen, which
5 is actually Paragraph 10 of that order. Your Honor, Paragraph
6 10, there's two concepts embedded here. First, it requires
7 any parties wishing to sue the independent directors or their
8 agents to first seek such approval from the Bankruptcy Court.
9 Secondly, and importantly for purposes of the independent
10 directors and their agents, who would include the employees,
11 it set the standard of care for them during the Chapter 11 and
12 entitled them to exculpation for negligence. Paragraph 10
13 says the Court will only permit a suit to go forward if such
14 claim represents a colorable claim for willful misconduct or
15 gross negligence.

16 And Your Honor, Paragraph 10 does not expire by its terms.

17 By not including negligence in the definition of what a
18 colorable claim might be, the Court has already exculpated the
19 independent directors and their agents, which include the
20 employees acting at their direction.

21 And because the independent directors and their agents are
22 exculpated under Paragraph 10, Strand needs to be exculpated
23 as well for actions occurring after January 9th. This is
24 because a suit against Strand for conduct after the
25 independent board was appointed is effectively a suit against

1 the independent directors, who were the only people in control
2 of Strand at that time.

3 After the effective date, Mr. Dondero will regain control
4 of Strand, as the independent directors will be discharged.
5 And for parties able to sue Strand essentially for negligence
6 for conduct conducted by the independent directors after
7 January 9th, Strand will then be able to seek indemnification
8 from the Debtor under the Debtor's partnership agreement
9 because the partnership agreement does provide the general
10 partner is entitled to indemnification.

11 Accordingly, an exculpation for Strand is really the
12 functional equivalent of an exculpation for the independent
13 directors and the Debtor.

14 The January 9th order was not appealed, and an objection
15 to exculpation at this point as it relates to the independent
16 directors, their agents, and Strand is a collateral attack on
17 this order. So, Your Honor, Your Honor does not even need to
18 get to the thorny issues addressed by *Pacific Lumber*.

19 However, even in the absence of the January 9th order,
20 exculpation of the independent directors and their employees,
21 as well as the other exculpated parties, is not prohibited by
22 *Pacific Lumber*. In *Pacific Lumber*, the Fifth Circuit reversed
23 a bankruptcy court order confirming a plan because the
24 exculpation provision was too broad and included parties that
25 the Fifth Circuit thought could not be exculpated under

1 Section 524(e) of the Code.

2 A close look at the issue before the Court, Your Honor,
3 the reasoning for the Court's ruling and why certain parties
4 like Committee and its members were entitled to exculpation,
5 reflects that this case does not prevent the Court from
6 approving exculpation of this case.

7 A careful read of the underlying briefs and opinions in
8 *Pacific Lumber* reveals that the concern that the Appellants
9 had in that case was the application of exculpation to non-
10 fiduciary sponsors. There were two competing plans in the
11 case. The first was filed by the indenture trustee. The
12 second was filed by the debtor's parent and lender, and was
13 deemed -- called the Marathon Plan. The Court confirmed the
14 Marathon Plan, and the indenture trustee appealed, and the
15 indenture trustee argued that the plan sponsors could not be
16 exculpated.

17 After determining that the appeal of the exculpation
18 provisions were not equitably moot, the Fifth Circuit
19 determined that exculpation was not authorized under 524(e) of
20 the Code because that section provides a discharge of the
21 debtor does not affect the liability of any other entity on
22 such debt.

23 However, and here's the important part, Your Honor: The
24 Fifth Circuit did not say that all exculpations are prohibited
25 under the Code and authorized the exculpation of the Committee

1 and its members. And why did the Court do that? Because it
2 looked at the Committee's qualified immunity under 1103 and
3 also reasoned that Committee members are essentially
4 disinterested volunteers that should be entitled to
5 exculpation on negligence.

6 The Court also cited approvingly *Colliers* for the
7 proposition that if Committee members were not exculpated for
8 negligence and subject to suit by people who are unhappy with
9 them, they just would not serve.

10 Accordingly, the Fifth Circuit based its willingness to
11 exculpate Committee members on the strong public policy that
12 supports exculpation for those parties under those
13 circumstances. And against this backdrop, Your Honor, there
14 are several reasons why the Court should authorize exculpation
15 in this case, notwithstanding *Pacific Lumber*.

16 First, Your Honor, the independent directors in this case
17 are analogous -- much more analogous to the Committee members
18 that the Fifth Circuit ruled were entitled to than the
19 incumbent officer and directors.

20 Your Honor has the following facts before the Court, based
21 upon the testimony of Mr. Seery and Mr. Dubel and other
22 evidence in the record. The independent board members were
23 not part of the Highland enterprise before the Court appointed
24 them on January 9th. The Court appointed the independent
25 directors in lieu of a Chapter 11 trustee to address what the

1 Court perceived as the serious conflicts of interest and
2 fiduciary duty concerns with current management, as identified
3 by the Committee.

4 The independent directors would not have agreed to accept
5 their role without indemnification, insurance, exculpation,
6 and the gatekeeper function provided by the January 9th order.

7 And Mr. Dubel testified regarding the significant
8 experience he has as an independent director during his 30-
9 plus years in the restructuring community, including several
10 engagements as an independent director in Chapter 11 cases.
11 And he testified that independent directors have become
12 commonplace in complex restructurings over the last several
13 years and have been appointed in many cases, including high-
14 profile cases. We've cited to just a few of those cases in
15 our brief, but we could go on and on.

16 Mr. Dubel testified that the independent directors are a
17 critical tool in proper corporate governance and restoring
18 creditor confidence in management in modern-day
19 restructurings, and he testified that, based upon his
20 experience, independent directors expect to be indemnified by
21 the company, expect to obtain directors and officers
22 insurance, and expect to be exculpated from claims of
23 negligence when they agree to be appointed.

24 He further testified that if independent directors cannot
25 be assured that they will be exculpated for simple negligence,

1 he believes they will be unwilling to serve in contentious
2 cases like the one we have here, which will have a material
3 adverse effect on the Chapter 11 restructuring process as we
4 know it.

5 Based upon the foregoing testimony, Your Honor, which is
6 uncontroverted, the Court should have no problem finding that
7 the independent directors are much more analogous to the
8 Committee members in *Pacific Lumber* who the Fifth Circuit said
9 could be exculpated.

10 The facts, these facts also distinguish this case from the
11 *Dropbox v. Thru* case which Your Honor decided and which was
12 reversed on this issue by the District Court. In neither
13 *Pacific Lumber* or *Thru* was there an argument that the policy
14 reasons that supported exculpation of Committee members also
15 supported the exculpation of the parties sought to be
16 exculpated.

17 Moreover, Your Honor, the independent directors in this
18 case were pointed as essentially as substitute for a Chapter
19 11 trustee. There was a Chapter 11 trustee motion filed a few
20 days before, I believe, and the Court, in approving this, said
21 that you -- better than a Chapter 11 trustee. And Chapter 11
22 Trustees are entitled to qualified immunity. So, while, yes,
23 the independent directors aren't truly Chapter 11 trustees,
24 they are analogous.

25 Second, Your Honor, while there is language in *Pacific*

1 *Lumber* that says that the directors and officers of the debtor
2 are not entitled to exculpation, the issue before the Court
3 really on appeal was the plan sponsors and whether they were.
4 So I would argue that any discussion of the exculpation not
5 being available for directors and officers in the Fifth
6 Circuit opinion in *Palco* is actually dicta.

7 Third, Your Honor, as I discussed before, the *Pacific*
8 *Lumber* decision was based solely on 524(e) of the Bankruptcy
9 Code, which only says that the discharge of a claim against
10 the debtor does not affect the discharge of a third party.
11 However, the Debtor is not relying on 524(e) as the basis of
12 their exculpation. As we outline in our brief, Your Honor, we
13 believe that the exculpation is appropriate under Section 105
14 and 1123(b) (6) as a means -- part of an implementation of the
15 plan.

16 Importantly, Your Honor, as other courts hostile to third-
17 party releases have determined, exculpation only sets a
18 standard of care for parties and is not an effort to relieve
19 fiduciaries of liability.

20 Other courts that have aligned with the Fifth Circuit and
21 rejected third-party releases, like the Ninth Circuit, have
22 recently determined exculpation has nothing to do with 524(e).
23 In *In re Blixseth*, a Ninth Circuit case decided at the end of
24 2020 cited in our materials, they examined several of their
25 circuit cases that had strongly prohibited non-consensual

1 third-party releases under 524(e). But again, the Court
2 concluded that 524(e) only prohibits third parties from being
3 released from liability of a prepetition claim for which the
4 debtor receives a discharge. The Court reasoned that the
5 exculpation clause, however, protects parties from negligence
6 claims relating to matters that occurred during the Chapter 11
7 case and has nothing to do with 524(e).

8 The Ninth Circuit, which along with the Fifth Circuit has
9 been notorious for prohibiting third-party releases, issued
10 its ruling against this backdrop and said that exculpations
11 are appropriate.

12 Your Honor, the Objectors made a point yesterday of
13 pointing out that Strand, as the Debtor's general partner, is
14 liable for the debts under applicable law. To the extent they
15 intend to argue that the exculpation is seeking to discharge
16 any such prepetition liability, they would be wrong. The
17 exculpation only applies to postpetition matters. And to the
18 extent they argue that the exculpation seeks to discharge
19 Strand's potential postpetition liability, for the reasons I
20 discussed, a claim against Strand will essentially be a claim
21 against the Debtor because the Debtor will be obligated to
22 indemnify them.

23 Accordingly, Your Honor, we submit that if this matter
24 goes up to appeal to the Fifth Circuit, which it may very well
25 do, that the Fifth Circuit may very well come out the same way

1 as the Ninth Circuit and start relaxing the standard or
2 otherwise provide that the independent directors are much more
3 like Committee members.

4 Lastly, Your Honor, if the Court does confirm the plan,
5 which we certainly hope it will do, it will have made a
6 finding that the plan has been proposed in good faith, and in
7 doing so, the Court essentially finds that the independent
8 directors and their agents have acted appropriately and
9 consistent with their fiduciary duties, and it makes --
10 exculpation for negligence naturally flows from that finding.

11 Your Honor, I would now like to go to the injunction
12 provisions, and my argument is that the injunction provisions
13 as amended are appropriate.

14 THE COURT: Can I stop you?

15 MR. POMERANTZ: We received several of -- yes.

16 THE COURT: I want to just recap a couple of things I
17 think I heard you say. You're not asking this Court, you say,
18 to go contrary to *Pacific Lumber* per se. You have thrown out
19 there the possibility that *Pacific Lumber* mistakenly relied on
20 524(e) in rejecting exculpations of plan sponsors. You're
21 saying, eh, as a technical matter, I think they were wrong in
22 focusing on that statute because that statute seems to deal
23 with prepetition liability. Okay? Its actual wording, 524(e)
24 states, discharge of a debt of a debtor does not affect the
25 liability of any other entity on such debts.

1 And reading between the lines, I think you're saying --
2 well, maybe this isn't what you're saying, but here's what I
3 inferred -- "debt" is defined in 101(12) to mean liability on
4 a claim, and then "claim" is defined in 101(5) of the
5 Bankruptcy Code as meaning right to payment. It doesn't say
6 as of the petition date, but I think if you look at, then,
7 Section 502 of the Bankruptcy Code that addresses claims and
8 interests, clearly, it seems to be referring to the
9 prepetition time period, you know, claims and interest as of
10 the petition date. And then -- that's 502. And then 503
11 speaks of, for the most part, postpetition administrative
12 expenses.

13 So that was my rambling way of saying I'm understanding
14 you to say, eh, as a technical matter, we think the Fifth
15 Circuit was wrong to focus on 524(e) because when you're
16 talking about exculpation you're talking about postpetition
17 liability, not prepetition liability. And 524(e) is talking
18 more about prepetition liability.

19 But I think what I also hear you saying is, at bottom,
20 *Pacific Lumber* was sort of a policy-driven holding where, you
21 know, we're worried about no one would ever sign up for being
22 on an unsecured creditors' committee if they could be exposed
23 to lawsuits. They're fiduciaries, we think, for policy
24 reasons. Exculpation is appropriate for this one group. And
25 you're saying, well, they didn't have an independent board

1 that they were considering. They were just considering non-
2 fiduciary plan sponsors. And so the rationale presented by
3 *Pacific Lumber* applies equally here, and just they didn't make
4 a holding in this factual context.

5 Have I recapped what you're saying?

6 MR. POMERANTZ: Your Honor, that's generally --
7 generally correct, with a couple of nuances. So, yes, first,
8 I think, on a policy basis, Your Honor -- again, putting aside
9 the January 9th order, because we don't see --

10 THE COURT: Right. Right.

11 MR. POMERANTZ: -- Your Honor even needs to get to
12 this issue.

13 THE COURT: I understand.

14 MR. POMERANTZ: But if Your Honor does get to this
15 issue, we think, as a first point, Your Honor could be totally
16 consistent with *Pacific Lumber* because there's policy reasons
17 and there was not a categorical rejection of exculpation.
18 Okay. So if there was a categorical rejection, then it
19 wouldn't have been okay for committee members. Okay.

20 Second argument, yes, we don't think -- we think it's part
21 of dicta. It's not part of the holding. We understand that
22 other courts may have not agreed, maybe your *Thru* case, which
23 Your Honor was appealed on.

24 But the third issue, our argument is all they looked at
25 was 524(e). They said 523 -- 4(e) does not authorize it.

1 They did not say 524(e) prohibits it.

2 We think there's other provisions in the Code. And then
3 when you basically add in the analysis that Your Honor
4 provided, which we agree with, and what 524 was -- to do,
5 524(e) just says that discharge doesn't affect. It doesn't
6 say that under another provision of the Code or for another
7 reason you are authorized to give an exculpation. I think
8 it's a nuance and it's a difference there.

9 And my point of bringing up the *Blixseth* case -- which, of
10 course, is Ninth Circuit and it's not binding on Your Honor,
11 it's not binding on the Fifth Circuit -- is to say, when that
12 was presented to them, they saw the distinction that 524(e)
13 has nothing to do with an exculpation. And while, yes, the
14 Fifth Circuit hasn't ruled on that, and if the Fifth -- if
15 that argument is made to the Fifth Circuit, we don't know how
16 they would rule, I think that, based upon their analysis --
17 which, again, Your Honor, is no more than a page and a half of
18 their opinion, right, of a long, lengthy opinion on the
19 confirmation issues. So I think, Your Honor, with the Fifth
20 Circuit, there is a good chance that based upon the developing
21 case law of exculpation, based upon the sister circuit in
22 *Blixseth* making that distinction, that there is a very good
23 chance that the Fifth Circuit would change.

24 But look, I recognize that argument requires Your Honor to
25 say, okay, this is outside and -- and what *Pacific Lumber* did

1 or didn't do. But I think, Your Honor, there's several
2 potential reasons, there's several potential arguments that
3 you can get to the same place.

4 THE COURT: Okay. Thank you.

5 MR. POMERANTZ: Okay. If I may just get another
6 glass of -- sip of water before my time starts?

7 THE COURT: Okay.

8 MR. POMERANTZ: Okay, Your Honor. We're now turning
9 to the injunction provision. The Debtor received several
10 objections to the injunction provisions in -- I think I have
11 it right now -- Article 9(f) to the plan. And we've modified
12 Article 9(f) to address certain of those concerns, and we
13 believe that, as modified, that the injunction provision
14 implements and enforces the plan's discharge, release, and
15 exculpation provisions to prevent parties from pursuing claims
16 in interest that are addressed by the plan and otherwise
17 interfering with consummation and implementation of the plan.

18 I'd like to put up the first paragraph of the injunction
19 on the screen now.

20 Okay, Your Honor. The first paragraph, all it does is
21 prohibits the enjoined parties from taking action to interfere
22 with consummation or implementation of the plan. I suspect a
23 sentence like that is probably in hundreds of plans in the
24 Fifth Circuit and elsewhere.

25 Initially, to address a concern that it applied to too

1 many parties, the Debtor added a definition in the revised
2 plan that defines "enjoined parties," which I'd like to now
3 put that definition up on the screen.

4 The changes -- it's a little hard to read there, but you
5 have it in the -- oh, there you go. The changes made clear
6 that only parties who have a relationship to this case, either
7 holding a claim or interest, having appeared in the case, be a
8 -- or be a party in interest, Jim Dondero, or related entity,
9 or related person of the foregoing are covered. The claim
10 objectors argue that the word "implementation and
11 consummation" is vague, or vague and unclear. Your Honor,
12 these terms are both defined in the Bankruptcy Code and under
13 the case law, and they're, as I said, common features of many
14 plans.

15 Section 1123(a)(5) of the Code provides that a plan shall
16 provide for its implementation, and identifies a list of items
17 that the plan can include. Article 4 of our plan is defined
18 as "Means of Implementation of This Plan," and describes the
19 various corporate steps required to implement the provisions
20 of the plan, including canceling equity interests, creation of
21 new general partners and a limited part of the Reorganized
22 Debtor, the restatement of the limited partnership agreement,
23 and the establishment of the various trusts.

24 Paragraph 1 rightly and appropriately enjoins efforts to
25 interfere with these steps.

1 Nor is the term "consummation of the plan" vague.
2 "Consummation" also is a commonly-used term and has been
3 defined by the Fifth Circuit and the Code. 1102 -- 1101(2)
4 defines "Substantial Consummation" to be the transfer of
5 assets to be transferred under the plan, the assumption by the
6 debtor of the management of all the property dealt with by the
7 plan, and the commencement of distributions under the plan.

8 Section 1142 gives the Court authority to direct a party
9 to perform any act necessary for consummation of a plan. And
10 as the Fifth Circuit, in *United States Brass Corp.*, which is
11 said in our material, states, said the Bankruptcy Court had
12 post-confirmation jurisdiction to enforce the unperformed
13 terms of a plan with respect to a matter that could affect the
14 parties' post-confirmation rights because the plan had not
15 been fully consummated.

16 And Your Honor just wrote on this issue last year in the
17 *Senior* -- the *Texas* -- the *TXMS Real Estate v. Senior Care*
18 case, and you cited to *U.S. Brass* to find that, in that case,
19 post-confirmation jurisdiction existed to resolve a dispute
20 relating to an assumed contract because the matter related to
21 interpretation, implementation, and execution of the plan.

22 Accordingly, Your Honor, neither implementation or
23 consummation are vague, and the first paragraph of the
24 injunction is necessary and appropriate to enforce the
25 Debtor's discharge.

1 As I said before, I will leave it to Mr. Kharasch to
2 address specifically the concerns that the Advisor and the
3 Funds have with the injunction.

4 The second and third paragraphs of the injunction, Your
5 Honor, certain parties have objected to them on the ground
6 that they constitute an improper release of the independent
7 directors as well as the release of claims against the
8 Reorganized Debtor, the Claimant Trust, and the Litigation
9 Sub-Trust, entities that will not have come into existence
10 until after the effective date.

11 We believe we have addressed these concerns by
12 modifications to the second and third paragraphs of the
13 injunction, which I would now like to put the second and third
14 paragraphs on the screen.

15 (Pause.)

16 MR. POMERANTZ: As that is happening, Your Honor, I
17 will -- there we go.

18 We believe that the changes that were made to these
19 paragraphs should address the Objectors' concerns.

20 First, as with the first paragraph, we have created a
21 defined term of "Enjoined Parties" who are subject to the
22 injunction which is narrower than all persons, I believe, or
23 all entities that was included in the prior plan. So we've
24 narrowed that.

25 "Enjoined Parties" are generally defined, as I mentioned

1 before, as entities involved in this case or related to Jim
2 Dondero, or have appeared in this case.

3 Second, we have removed independent directors from these
4 paragraphs to address the concern that the injunction was a
5 disguised third-party release.

6 Third, we have removed the Reorganized Debtor and the
7 Claimant Trust from the second paragraph and moved them to the
8 third paragraph. We did this to make clear that the
9 Reorganized Debtor and Claimant Trust were only getting the
10 benefit of the injunction as the successors to the Debtor. As
11 the Reorganized Debtor and the Claimant Trust receives the
12 property from the Debtor free and clear of all claims and
13 interests and equity holders under 1141(c), they are entitled
14 to the benefit of the injunction.

15 Fourth, we have addressed the concern that the injunction
16 improperly affected set-off rights. We added language to make
17 clear that the injunction would only affect the parties' set-
18 off of an obligation owed to the Debtor to the extent that
19 that was permissible under 553 and 1141 of the Bankruptcy
20 Code.

21 In other words, we are punting the issue for another day,
22 and there's nothing in the plan that gives the Debtor any more
23 set-off rights than it otherwise has under the Bankruptcy
24 Code.

25 Lastly, Your Honor, certain Objectors have argued that the

1 injunction somehow prevents them from enforcing the rights
2 they have under the plan or the confirmation order. We don't
3 really understand this concern, as the language leading into
4 the second paragraph of the injunction says, except as
5 expressly provided in the plan, the confirmation order, or a
6 separate order of the Bankruptcy Court.

7 With these modifications, Your Honor, the provisions do
8 nothing more than implement 1123(b)(6) and 1141 by preventing
9 parties from taking actions to interfere with the Debtor's
10 plan.

11 The Court has also heard testimony from Mr. Seery
12 regarding the importance of the injunction to implementation
13 of the plan. He testified that he intends to monetize assets
14 in a way that will maximize value. And to effectively do
15 that, he has testified that the Claimant Trust needs to be
16 able to pursue its objectives without interference and
17 continued harassment from Mr. Dondero and his related
18 entities.

19 In fact, Mr. Seery testified that if the Claimant Trust
20 were subject to interference by Mr. Dondero, it would take him
21 more time to monetize assets, they would be monetized for less
22 money, and creditors would be harmed.

23 If Your Honor doesn't have any questions for me on the
24 injunction provisions, I'd like to turn to the last part of
25 the injunction, which is really the gatekeeper provision.

1 THE COURT: All right. You may.

2 MR. POMERANTZ: Your Honor, the last paragraph in
3 Article 9(f) is really not an injunction but is rather a
4 gatekeeper provision. And as originally drafted, it'd do two
5 things: first, it'd require that before any entity, which is
6 defined very broadly, could file an action against a protected
7 party relating to certain specified matters, the entity would
8 have to seek a determination from this Court that the claim
9 represented are colorable claim of bad faith, criminal
10 conduct, willful misconduct, fraud, or gross negligence. The
11 specified matters to which the gatekeeper provision would
12 apply included the Chapter 11 case, negotiations regarding the
13 plan, the administration of the plan, the property to be
14 distributed under the plan, the wind-down of the Debtor's
15 business, the administration of the Claimant Trust, or
16 transactions related to the foregoing.

17 Subject to certain exceptions for Dondero-related parties,
18 protected parties were defined to include the Debtor, its
19 successors and assigns, indirect and direct, majority-owned
20 subsidiaries and managed funds, employees, Strand, Reorganized
21 Debtor, the independent directors, the Committee and its
22 members, the Claimant Trust, the Claimant Trustee, the
23 Litigation Trust, the Litigation Sub-Trustee, the members of
24 the Oversight Committee, retained professionals, the CEO and
25 CRO, and persons related to the foregoing. Essentially,

1 parties related to the pre-effective-date administration of
2 the estate or the post-confirmation implementation of the
3 plan.

4 Second, the gatekeeper provision as originally presented
5 gave the Bankruptcy Court exclusive jurisdiction to adjudicate
6 any cause of action that it determined would pass through the
7 gate. The gatekeeper provision, Your Honor, is not a release
8 in any way. Rather, it permits enjoined parties who believe
9 they have a claim against the protected parties to pursue such
10 a claim, provided they first make a showing that the claim is
11 colorable to the Bankruptcy Court.

12 Several parties, Your Honor, objected to the Bankruptcy
13 Court having exclusive jurisdiction to adjudicate the claims
14 that pass through the gate. The Debtor believes that the
15 Bankruptcy Court would ultimately have jurisdiction of any of
16 those claims that pass through the gate. However, the Debtor
17 did, upon reflection, appreciate the concern that if the Court
18 agreed to that now, it would essentially be determining its
19 jurisdiction before a claim was filed.

20 Accordingly, in the January 22nd plan, Your Honor, we
21 amended the provision to provide that the Bankruptcy Court
22 will only have jurisdiction over such claims to the extent it
23 was legally permissible to do so, essentially deferring the
24 issue to a later time.

25 And as Your Honor, I believe, in one of cases called the

1 *Icing on the Cake*, the retention and jurisdiction provisions
2 in the plan only are to the extent under applicable law and
3 are quite broad and include the things that we would have the
4 Court -- have jurisdiction for the Court, otherwise
5 determined.

6 The Court made some other changes to the gatekeeper
7 provision, and I would like to place the amended gatekeeper
8 provision on the screen right now. In addition to the change
9 I mentioned, the Debtor made the following changes: the
10 provision is limited now to apply only to enjoined parties,
11 rather than any entity. Than any entity. Much narrower. The
12 provision added the administration of the Litigation Sub-Trust
13 to the matters to which the provision would apply. The
14 provision makes clear now that any claim, including
15 negligence, is a claim that could be sought and pursued
16 through the gatekeeper function. And the provision made some
17 other syntax changes.

18 We believe, Your Honor, with these changes, we believe
19 that the gatekeeper provision is within the Court's
20 jurisdiction and it's appropriate to include under the plan.

21 But certain parties have argued that the Court does not
22 have the authority, the jurisdictional authority to perform
23 the gatekeeper function, separate and apart from whether it
24 has jurisdiction to adjudicate the claims that pass through
25 the gate.

1 Your Honor, we submit that these arguments represent a
2 fundamental misunderstanding of Bankruptcy Court jurisdiction
3 and the Court's authority to make sure the Debtor is free of
4 interference in carrying out the plan which I'll get to in a
5 couple moments.

6 As a preliminary matter, Your Honor, it is important for
7 the Court to remember that Paragraph 10 of the January 9 order
8 already contains a gatekeeper provision as it relates to the
9 independent directors and their agents. And as I mentioned on
10 a couple of occasions, that order is not going away, it
11 doesn't expire by its terms, and it cannot be collaterally
12 attacked in this forum.

13 The Debtor does acknowledge, though, that the gatekeeper
14 provision in the plan is broader in terms of the people it
15 protects and it applies to post-confirmation matters.

16 Before I address the Court's authority to approve the
17 gatekeeper provision, I want to summarize the evidence that it
18 has heard from Mr. Seery and Mr. Tauber regarding why the
19 gatekeeper is so important a provision to the success of the
20 plan.

21 Although the Court is all too familiar with the history of
22 litigation initiated by and filed against Mr. Dondero and his
23 related affiliates, Mr. Seery spent some time on the stand
24 testifying about the litigation so the Court would have a
25 complete record for this hearing. He testified that prior to

1 the petition date, the Debtor faced years of litigation from
2 Mr. Terry and Acis that led to the *Acis* bankruptcy case, which
3 Your Honor has said many times it's still in your mind. Years
4 of litigation with the Redeemer Committee which precipitated
5 the filing of a bankruptcy case and resulted in an award very
6 critical of the Debtor's conduct. Years of litigation with
7 UBS. Years of litigation with Patrick Daugherty. And we
8 placed all the dockets for all these matters before the Court.

9 Also, during the bankruptcy and after the Committee
10 essentially rejected the Debtor's pot plan proposal and
11 indicated -- and the Debtor indicated it would be terminating
12 the shared service agreements with Mr. Dondero and his related
13 entities, the Debtor was the subject of harassment from Mr.
14 Dondero and related entities which resulted in the temporary
15 restraining order against him, a preliminary injunction
16 against him, a contempt motion, which Your Honor is scheduled
17 to hear Friday, a motion by the Debtor's controlled -- by the
18 Dondero-controlled investors and funds in CLO managed --
19 managed by the Debtor, which the Court referred to that motion
20 as being frivolous and a waste of the Court's time. Multiple
21 plan objections, most of which are focused on allowing the
22 Debtors to continue their litigation crusade against the
23 Debtor and its successors post-confirmation. An objection to
24 the Debtor approval of the *Acis* order and a subsequent appeal.
25 An objection to the HarbourVest settlement and subsequent

1 appeal. A complaint and injunction against the Advisors and
2 the Funds to prevent them from violating Paragraph 9 of the
3 January 9th order. And a temporary restraining order against
4 those parties, which was by consent.

5 Mr. Dondero's counsel tends to argue that he is the victim
6 here and that the litigation is being commenced against him
7 and -- instead of by him. That response does not even deserve
8 a response, Your Honor. It is disingenuous.

9 Mr. Tauber testified that he was part of the team at Aon
10 that sourced coverage for the independent directors after
11 their appointment in January 2020 and that he has over 20
12 years of underwriting experience. He testified that at Aon he
13 builds bespoke insurance programs which are not cookie-cutter
14 programs for his clients, with an emphasis on D&O and E&O.
15 And he was asked by the independent board to obtain D&O and
16 E&O insurance after the board's appointment on January 9th.

17 Based upon the process Aon conducted in reaching out to
18 insurance carriers, Mr. Tauber testified that Aon was only
19 able to obtain D&O insurance based upon the inclusion of
20 Paragraph 10 of the January 9 order, the gatekeeper provision.
21 I know Mr. Taylor said that that was spoon-fed to the
22 insurers, but Mr. Tauber's testimony is they knew about Mr.
23 Dondero and they knew about his litigation tactics, so it is
24 not a good inference to be made from the testimony that they
25 would not have required something. They probably would have

1 just said no.

2 Aon has now been -- Mr. Tauber testified that Aon has now
3 been asked to obtain D&O coverage for the Claimant Trustee,
4 the Litigation Trustee, the Oversight Committee, the members,
5 the Claimant Trust, and the Litigation Sub-Trust. He
6 testified that he and Aon have approached the insurance
7 carriers that they believe might be interested in underwriting
8 coverage.

9 And no, he hasn't approached every D&O and E&O carrier out
10 there, and there may be, just like an investment banker
11 doesn't have to approach everyone. They are experts in the
12 field, and he testified they approached the people they
13 thought would likely be willing or interested and potentially
14 be willing to extend coverage. And as a result of Aon's
15 efforts, Mr. Tauber has determined that there's a continued
16 resistance to provide any coverage that does not contain an
17 exclusion for actions relating to Mr. Dondero or his related
18 entities. And he further believes that all carriers that will
19 -- that have discussed a willingness to provide coverage will
20 only do so if there is a gatekeeper provision, and only one
21 carrier will agree to provide coverage without a Dondero
22 exclusion.

23 Mr. Tauber testified that he believes that any ultimate
24 policy will provide that if at any time the gatekeeper
25 provision is not in place, either the carrier will not cover

1 any actions related to Mr. Dondero or his affiliates or that
2 the coverage will be vacated or voided.

3 Based upon the foregoing record, Your Honor, which is
4 uncontroverted, there's ample justification on a factual basis
5 for approval of the gatekeeper provision.

6 I will now turn to the Court's authority to approve the
7 gatekeeper provision.

8 There are three alternative bases upon which the Court can
9 approve the gatekeeper provision. First, several provisions
10 of the Bankruptcy Code give broad authority to approve a
11 provision like the gatekeeper provision.

12 Second, the Court can analogize to the Barton Doctrine the
13 facts and circumstances in this case and authorize the Court
14 to act as a gatekeeper to prevent frivolous litigation from
15 being filed against court-appointed officers and directors and
16 those that will lead the post-confirmation monetization of the
17 estate's assets.

18 And third, Your Honor, the Court can find that Mr. Dondero
19 and his entities are vexatious litigants, and use the
20 gatekeeper provision as a sanction to prevent the filing of
21 baseless litigation designed merely to harass those in charge
22 of the estate post-confirmation.

23 So, Bankruptcy Court authority. Your Honor, there are
24 several provisions in the Bankruptcy Code which we rely on to
25 support the Court's authority. First, Section 1123(a)(5)

1 permits the plan to approve adequate means of implementation,
2 and contains a long, non-exclusive list. Mr. Seery's
3 testimony is uncontroverted that a gatekeeper provision is
4 necessary for the adequate implementation of the plan.

5 Second, Your Honor, 1123(b)(6) authorizes a plan to
6 include any appropriate provision in a plan not inconsistent
7 with any other provision in this Code. There are not any
8 provisions and none have been cited by the Objectors that
9 would prohibit a gatekeeper provision. Section 1141
10 effectively holds that the terms of a plan bind the debtor and
11 its creditors and vest property in a reorganized debtor, free
12 and clear of the interests of third parties.

13 If nothing else, Your Honor, the spirit of 1141 allows the
14 Court to prevent, in appropriate cases, vexatious litigation
15 by unhappy creditors and parties in interest from torpedoing
16 the plan.

17 1142(b), Your Honor, provides that the confirmation --
18 that, after confirmation, the Court may direct any parties to
19 perform any act necessary for the consummation of the plan,
20 and requiring the party to seek court-approval before filing
21 an action is certainly an act.

22 And lastly, Your Honor, Section 105 allows the Court to
23 enter orders necessary to order other things, enforce orders
24 of the Court like the confirmation order, and prevent an abuse
25 of process which would certainly occur if baseless litigation

1 were filed against the parties in charge of the Reorganized
2 Debtor and the trust vehicles entrusted with carrying out the
3 plan.

4 Your Honor, gatekeepers are not a novel concept and have
5 been approved by courts in appropriate circumstances. In the
6 *Madoff* cases, the Court has been the gatekeeper post-
7 confirmation to determine whether investor claims are
8 derivative or direct claims.

9 In *General Motors*, the Court has been the gatekeeper post-
10 confirmation to determine whether product liability claims are
11 proper claims against the reorganized debtor.

12 Closer to home, Judge Lynn, Mr. Dondero's counsel,
13 approved a gatekeeper provision, arguably even more far-
14 reaching than the provision here, in the *Pilgrim's Pride* case.
15 In that case, Judge Lynn held that *Pacific Lumber* prevented
16 him -- prevented the Court from approving the exculpation
17 provision in the plan. However, he did hold that it was
18 appropriate for the Court to ensure that debtor
19 representatives are not improperly pursued for their good-
20 faith actions by requiring that any actions against the debtor
21 or its representatives, and further, on the performance of
22 their obligations as debtor-in-possession, be heard
23 exclusively before the Bankruptcy Court.

24 And *Pilgrim's Pride* is not the only case in this district
25 to include a gatekeeper provision, as Judge Houser approved

1 one in the *CHC Group* in 2016, which is cited in our materials.

2 The theme in all these cases, Your Honor, is that there
3 are circumstances where it is necessary and appropriate for
4 the Bankruptcy Court to act as a gatekeeper as a means of
5 reducing litigation that could interfere with a confirmed plan
6 and that a Court has the authority to approve such provisions.

7 The Objectors argue that the Bankruptcy Court does not
8 have jurisdiction to approve that provision. The Debtor
9 understands the argument as it related to the prior provision,
10 which gave the Court exclusive jurisdiction over any claim it
11 found colorable, and we've amended the plan to address that
12 issue. The jurisdiction to deal with those claims could be
13 left to a later day.

14 But to the extent the Objectors still pursue the
15 jurisdiction argument in light of the current provision,
16 they're really conflating two very different things: the
17 ability to determine whether a claim is colorable and the
18 ability to adjudicate that claim if the Court determines it's
19 colorable.

20 None of the authorities cited by the Objectors hold that
21 the Court is without jurisdiction to approve a gatekeeper
22 provision like the one here. So, rather, what they do is they
23 try to -- they argue, based upon the *Craig's Stores* case,
24 which is narrower than other circuits of post-confirmation
25 jurisdiction in the Bankruptcy Court, and argue that the

1 gatekeeper provision doesn't fall within that. But that --
2 such reliance is misplaced, Your Honor.

3 *Craig* held that the Bankruptcy Court did not have
4 jurisdiction to adjudicate a post-confirmation dispute over a
5 private-label credit card agreement between the debtor and the
6 bank. In declining to find jurisdiction, the Fifth Circuit
7 remarked that there was no antagonism or claim pending between
8 the parties as of the reorganization and no facts or law
9 deriving from the reorganization or the plan was necessary to
10 the claim asserted by the debtor.

11 However, in so ruling, Your Honor, the Fifth Circuit did
12 reason that post-confirmation jurisdiction in the Bankruptcy
13 Court continues to exist for matters pertaining to
14 implementation and execution of the plan. Requiring parties
15 to seek Bankruptcy Court determination the claim is colorable
16 before embarking on litigation that will impact
17 indemnification rights and affect distributions to creditors
18 is not an expansion of jurisdiction and fits well within the
19 *Craig* reasoning.

20 Unlike the credit card agreement dispute in *Craig*, Mr.
21 Dondero and his entities have demonstrated tremendous
22 antagonism towards the Debtor. And while the Debtor's plan
23 may be confirmed, further litigation has been threatened by
24 Mr. Dondero. It's in the pleadings. That's one of the
25 reasons Mr. Dondero says his plan is better. It'll avoid

1 tremendous amount of litigation.

2 After *Craig*, the Fifth Circuit again examined the
3 bankruptcy court's post-confirmation jurisdiction in the
4 *Stoneridge* case in 2005. In that case, the Fifth Circuit
5 ruled that a bankruptcy court has post-confirmation
6 jurisdiction to resolve a dispute between two nondebtors that
7 could trigger indemnification claims against a liquidating
8 trust formed as a result of a confirmed plan.

9 And lastly, as I mentioned Your Honor's decision before,
10 the *TXMS Real Estate* case, I think just a couple of months
11 ago, it stands for the proposition that post-confirmation
12 jurisdiction exists for matters bearing on the implementation,
13 interpretation, and execution of a plan. In that case, Your
14 Honor ruled that Your Honor had jurisdiction to resolve a
15 post-confirmation dispute between a liquidating trust formed
16 under a plan and a landlord, the result of which could
17 significantly and adversely affect the value of the
18 liquidating trust and monies available for unsecured
19 creditors.

20 And you have heard Mr. Seery testify that litigation will
21 have an adverse effect on the ability to make distributions to
22 creditors.

23 So, Your Honor, under these authorities, the Court
24 undoubtedly would have jurisdiction to act as the gatekeeper
25 for the litigation.

1 There's also an independent basis for the gatekeeper
2 provision, Your Honor, the Barton Doctrine, which the Court is
3 very familiar from your opinion in the *In re Ondova* case in
4 2017 and which provides that before a suit may be brought
5 against a trustee, leave of Court is required. In *Ondova*, the
6 Court reviewed the history of the doctrine in connection with
7 litigation brought by a highly-litigious debtor against a
8 trustee and his professionals. This Court noted that there
9 are several important policies followed by the doctrine,
10 including a concern for the overall integrity of the
11 bankruptcy process and the threat of trustees being distracted
12 from or intimidated from doing their jobs. And Your Honor's
13 language still: For example, losers in the bankruptcy process
14 might turn to other courts to try to become winners there by
15 alleging the trustee did a negligent job.

16 Your Honor, this is precisely what the Debtor is trying to
17 prevent here, Mr. Dondero and his entities from putting the
18 bad experience before Your Honor in this case behind it and
19 going to try to find better luck in a more hospitable court.

20 Your Honor, the Barton Doctrine originally only applied to
21 receivers, and over the course of time has been extended to
22 apply to various court-appointed fiduciaries, as we have cited
23 in our materials: trustees, debtors-in-possession, officers
24 and directors, employees, and attorneys representing the
25 debtor.

1 And I expect the Objectors to argue that there is a
2 statutory exception to the Barton Doctrine under 28 U.S.C. 959
3 and it does not apply to acts or transactions in carrying out
4 business conducted with a property. The exception, Your
5 Honor, is very narrow and was meant to apply for things like
6 slip-and-fall cases. In fact, the Eleventh Circuit in the
7 *Carter v. Rodgers* case, 220 F.3d 1249 in 2000, held that
8 Section 11 -- 28 U.S.C. 959(a) does not apply to suits against
9 trustees for administering or liquidating the bankruptcy
10 estate.

11 The Objectors also argue that the gatekeeper provision
12 violates *Stern v. Marshal*. However, as the Court acknowledged
13 in *Ondova*, the Fifth Circuit in *Villegas v. Schmidt* has
14 recognized that the Barton Doctrine remains viable post-*Stern*
15 *v. Marshal*. The Fifth Circuit reasoned that while Barton
16 Doctrine is jurisdictional in that a court does not have
17 jurisdiction of an action if preapproval has not been
18 obtained, it does not implicate the extent of a bankruptcy
19 court's jurisdiction to adjudicate the underlying claim,
20 precisely the distinction we're making here. The bankruptcy
21 court would be the gatekeeper for deciding whether the claim
22 passes through the gate, and then after will decide if it has
23 jurisdiction to rule on the underlying claim.

24 And this is important especially in a case like this, Your
25 Honor, where Your Honor has had extensive experience with the

1 parties and is in the best position to determine whether the
2 claims are valid or attempted to be used as harassment.

3 The Objectors will complain about the open-ended nature of
4 the gatekeeper provision, whether it will or won't apply after
5 the case is closed or a final decree is issued, and the unfair
6 burden of their rights.

7 Your Honor has a previous reported opinion where basically
8 jurisdiction does extend after a case is closed or a final
9 decree is entered, so that issue is a red herring.

10 As Your Honor is well aware, it's a decade-long -- a
11 decade of litigation against the Dondero-controlled entities
12 that caused the Highland bankruptcy. And the Court is very
13 well aware of the litigation that occurred in *Acis*, very well
14 aware of the litigation that's occurred here that I mentioned
15 a few minutes ago. Your Honor, it is not over, you'll be
16 presiding over the contempt hearing.

17 And if the Court needs yet another ground to approve the
18 gatekeeper provision, the Debtor submits that the procedure is
19 an appropriate sanction for Dondero's vexatious litigation
20 activities. We cited the *In re Carroll* case in the Fifth
21 Circuit of 2017 that held that a bankruptcy court has the
22 authority to enjoin a litigant from filing any pleading in any
23 action without the prior authority from the bankruptcy court.

24 And in affirming the decision of the bankruptcy court, the
25 Fifth Circuit commented on the reasons the bankruptcy court

1 gave for its ruling. After recounting the bad faith of
2 appellants, the bankruptcy court determined that the Carrolls'
3 true motives were to harass the trustee and thereby delay the
4 proper administration of the estate, in the hope that they
5 would be able to retain their assets or make pursuit of the
6 assets so unappealing that the trustee would be compelled to
7 settle on terms favorable to appellants.

8 Sounds familiar, Your Honor. The same can certainly be
9 said about what Mr. Dondero is doing in this case.

10 And to make a showing that a party is vexatious litigant,
11 the Court must find that the party has a history of vexatious
12 and harassing litigation, whether the party has a good faith
13 -- the litigation or has filed it as a means to harass, the
14 burden to the Court and other parties, and the adequacy of
15 alternative sanctions.

16 And as Your Honor is well aware from all the litigation,
17 Your Honor is well, well able to make the finding required for
18 the vexatious litigation finding.

19 But here, we don't ask for the drastic sanction of
20 enjoining from any further filings. Rather, we just ask for a
21 less-severe sanction, requiring Mr. Dondero and his entities
22 to first make a showing that he has a colorable claim.

23 The Fifth Circuit in *Baum v. Blue Moon*, 2007, did exactly
24 that. In *Baum*, the district court barred a vexatious litigant
25 from initiating litigation without first obtaining the

1 approval of the district court. Ultimately, the matter
2 reached the Fifth Circuit after the district court had
3 modified the pre-filing injunction to limit it to a certain
4 case, and then broadened it again based upon continued bad
5 faith conduct.

6 On appeal, the Fifth Circuit, citing several prior cases,
7 noted that a district court has the authority to impose a pre-
8 filing injunction to defer vexatious, abusive, and harassing
9 litigation.

10 And for those reasons, Your Honor, the Debtor asks the
11 Court to overrule any objections to the gatekeeper provision.

12 Your Honor, I was just going to then go to the plan
13 modification provisions, but I wanted to stop and see if you
14 had any questions at this point.

15 THE COURT: I do not. Let's give him a time
16 estimate, Nate. About how --

17 THE CLERK: Twenty.

18 MR. POMERANTZ: I have another five or six minutes, I
19 think, based upon --

20 THE COURT: Okay.

21 MR. POMERANTZ: And then I'll be ready to turn it
22 over to --

23 THE COURT: Okay.

24 MR. POMERANTZ: -- to Mr. Kharasch.

25 THE COURT: All right. Yes. You've got -- you've

1 done an hour and 33 minutes. So you have about, I guess, 37
2 minutes left. Okay. Go ahead.

3 MR. POMERANTZ: Thank you, Your Honor.

4 I would like to address the modifications of the plan that
5 were contained in our January 22nd plan and the additional
6 changes filed on February 1, several of which I have referred.

7 As a preliminary matter, Your Honor, under 1127(b), the
8 Debtor can modify a plan at any time prior to confirmation if
9 -- and not require resolicitation if there's no adverse change
10 in the treatment of claim or interest of any equity holder.

11 With that background, I won't go through the changes we
12 made that I've already discussed, but I will point out a
13 couple, Your Honor, that I would like to point out now. We
14 have modified the plan with respect to conditions of the
15 effective date in Article 8. First, a condition to the
16 effective date will now be entry of a final order confirming a
17 plan, as opposed just to entry of order. And final order is
18 defined as the exhaustion of all appeals.

19 In addition, the ability to obtain directors and officers
20 insurance coverage on terms acceptable to the Debtor, the
21 Committee, the Claimant Trustee, the Claimant Trustee
22 Oversight Board, and the Litigation Trustee is now a condition
23 to the effective date.

24 The Court heard testimony today and has experienced
25 firsthand the litigiousness of Mr. Dondero and his related

1 entities. And the Court heard testimony from Mr. Tauber and
2 Aon that the D&O insurance will not be available post-
3 effective date without assurances that the gatekeeper
4 provision will be in effect for the duration of the policy and
5 any run-off period.

6 Mr. Tauber further testified that he expected the final
7 terms from the insurance carrier to provide that if the
8 confirmation order was reversed on appeal and the gatekeeper
9 was removed, it would void -- it would either void the
10 directors and officers coverage or it'd result in a Dondero
11 exclusion.

12 Mr. Dondero and his entities are no strangers to the
13 appellate process, as Your Honor knows. They appealed several
14 of your orders, and continue the tack in this case, having
15 appealed the Acis and the HarbourVest orders and the
16 preliminary injunction. It would not surprise the Debtor if
17 Mr. Dondero and his entities appealed your confirmation order,
18 if Your Honor decides to confirm the plan.

19 The Debtor is confident that it will prevail on any appeal
20 in the confirmation order, as we believe the Debtor has made a
21 compelling case for confirmation.

22 The Debtor also believes a compelling case exists that if
23 the plan went effective without a stay pending appeal, that
24 the appeal would be equitably moot, but we understand we are
25 facing headwinds from the courts, bankruptcy court have

1 addressed that issue before.

2 However, given the effect a reversal would have on the
3 availability of insurance coverage, the Claimant Trustee, the
4 Claimant Oversight Committee, and the Litigation Trustee are
5 just not willing to take that risk.

6 We are hopeful that Mr. Dondero and his entities will
7 recognize that any appeal is futile and step aside and let the
8 plan proceed and become effective.

9 If Mr. Dondero and his related entities do appeal the
10 confirmation order, preventing it from becoming final and
11 preventing the effective date from the occurring, the Debtor
12 intends to work closely with the Committee to ratchet down
13 costs substantially and proceed to operate and monetize assets
14 as appropriate until an order becomes final.

15 None of these modifications adversely affect the treatment
16 of claims or interests under the plan, Your Honor, and for
17 those reasons, Your Honor, we request that the Court approve
18 those modifications.

19 And with that, I would like to turn the podium over to Mr.
20 Kharasch to briefly address the remaining CLO objections.

21 THE COURT: All right. Mr. Kharasch?

22 CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

23 MR. KHARASCH: Good afternoon, Your Honor. I'll be
24 as brief as possible. I know we're under a deadline.

25 As you've heard yesterday, you've heard before in other

1 proceedings, Your Honor, the CLO Objecting Parties, the so-
2 called investors, do have rights under the CLO management
3 agreements and indentures, including contractual rights to
4 terminate the management agreements under certain
5 circumstances.

6 What they complain about today, Your Honor, is that the
7 injunction language in the plan, including the language
8 preventing actions to interfere with the implementation and
9 consummation of the plan, is so broad and ambiguous that their
10 rights are or may be improperly impacted, especially any
11 rights to remove the manager for acts of malfeasance.

12 But the Debtor is primarily relying, Your Honor, not so
13 much on the plan injunctions but on the clear provisions of
14 the January 9 order, to which Mr. Dondero consented and which
15 provides that Mr. Dondero shall not cause any of his related
16 entities to terminate any agreements with the Debtor.

17 Yes, that is a broad provision, but it is very clear, and
18 it does not even allow the CLO Objecting Parties to come to
19 court under a gatekeeper-type provision. But that is what Mr.
20 Dondero consented to on behalf of himself and his related
21 entities.

22 Important to note, Your Honor, we are not here today to
23 litigate who is and who is not a related entity. That will be
24 left for another day. However, Your Honor, we have considered
25 these issues, including last night and this morning, and we

1 are going to propose -- well, we will modify our plan through
2 a provision in the confirmation order to provide the
3 following: Notwithstanding anything in the plan or the
4 January 9 order, the CLO Objecting Parties will not be
5 precluded from exercising their contractual or statutory
6 rights in the CLOs based on negligence, malfeasance, or any
7 wrongdoing, but before exercising such rights shall come to
8 this Court to determine whether those rights are colorable and
9 to also determine whether they are a related entity. If the
10 Court has jurisdiction, the Court can determine the underlying
11 colorable rights or claims.

12 This does not impact the separate settlement we have with
13 CLO Holdco, Your Honor.

14 We think that such modification addresses some of the
15 concerns raised yesterday by the objecting parties by
16 providing more clarity as to what the plan is doing and not
17 doing with respect to the plan and the January 9 order, and we
18 think it is also a fair resolution of some legitimate
19 concerns.

20 So, with that, Your Honor, we think that, with that
21 clarification that we did not have to make but are willing to
22 make, that this should fully satisfy the CLO Objecting Parties
23 with regard to their objections to the injunction and the
24 gatekeeper.

25 Thank you, Your Honor.

1 THE COURT: All right. Mr. Clemente?

2 CLOSING ARGUMENT ON BEHALF OF THE CREDITORS' COMMITTEE

3 MR. CLEMENTE: Yes, Your Honor. And I actually am
4 going to be brief. Mr. Pomerantz's discussion, obviously, was
5 very, very thorough, so I'm able to cut out a lot of stuff.

6 Thank you, Your Honor. Matt Clemente, Sidley Austin, on
7 behalf of the Committee.

8 The plan, Your Honor, meets the confirmation standards and
9 should be confirmed. Mr. Pomerantz covered a lot of ground,
10 and I will endeavor not to repeat that, but there are a few
11 points that I think the Committee wishes to emphasize.

12 Your Honor, since I first appeared in front of you, I have
13 maintained consistently that no plan can or should be
14 confirmed without the consent of the Committee. Your Honor,
15 in her wisdom, understood this immediately, as it was obvious
16 -- it was the obvious conclusion, given the makeup of the
17 creditor body, the asset pool, and the impetus for the filing
18 of the case.

19 Unfortunately, not everyone came to this conclusion so
20 easily, and it took much hard-fought negotiations as well as a
21 defeated disclosure statement, among other things, and
22 tireless dedication and commitment by each individual
23 Committee member to drive for a value-maximizing plan that is
24 in the best interests of its constituencies and for us to get
25 to where we are today.

1 And where we are today, Your Honor, is at confirmation for
2 a plan that the Committee unanimously supports, which was the
3 inevitable outcome for this case from the very beginning.

4 I've also said, Your Honor, that context is critical in
5 this case. It has been from the beginning, and it remains so
6 now. Mr. Draper, interestingly, began his comments yesterday
7 by saying that even a serial killer is entitled to *Miranda*
8 rights. While I will admit that at times the rhetoric in this
9 case has been heated, I have never certainly likened Mr.
10 Dondero to a serial killer. But the record shows, and Mr.
11 Dondero's own words and actions show, that he is, in fact, a
12 serial litigator who has no hesitation at all to take any
13 position in an attempt to leverage an outcome that suits his
14 self-interest. And he has no hesitation at all to use his
15 many tentacles in a similar fashion.

16 That is a very important context in which the Court should
17 view the remaining objections of the Dondero tentacles and
18 weigh confirmation of the Debtor's plan.

19 Against this context of a serial litigator, Your Honor, we
20 have a plan supported by each member of the Official Committee
21 of Unsecured Creditors, accepted by two classes of claims,
22 Class 2 and Class 7, and holders of almost one hundred percent
23 in amount of non-insider claims in Class 8.

24 The parties that have voted against the plan are either
25 employees who are not receiving distributions under the plan

1 or are insiders or parties related to Mr. Dondero.

2 The overwhelming number and amount of creditors who are
3 receiving distributions under this plan, therefore, have
4 accepted the plan. The true creditors and economic parties in
5 interest have spoken, they have spoken loudly, and they have
6 spoken in favor of confirming the plan.

7 Your Honor, I'm not going to address the technical
8 requirements, as Mr. Pomerantz did that. So I'm going to skip
9 over my remarks in that regard, except I do want to emphasize
10 the remarks regarding the gatekeeper, exculpation, and
11 injunction provisions as they're of critical importance to the
12 plan.

13 The testimony has shown and the proceedings of this case
14 has shown, again, Mr. Dondero is a serial litigator with a
15 stated goal of causing destruction and delay through
16 litigation.

17 The testimony has further shown that none of the
18 independent board members would have signed onto the role
19 without the gatekeeper and injunction provisions and the
20 indemnity from the Debtor.

21 Therefore, it follows that such provisions are necessary
22 to entice parties to serve in the Claimant Trustee and other
23 roles under the plan, which, as I remarked in my opening
24 comments, are integral to providing the structure that the
25 creditors believe is necessary to unlocking the value and

1 unlocking themselves from the Dondero web.

2 Regarding the exculpation and injunction provisions
3 specifically, Your Honor, the Court will recall that the
4 Committee raised objections to them in connection with the
5 first disclosure statement hearing. In response, the Debtor
6 narrowed the provisions, and the Committee believes they
7 comply with the Fifth Circuit precedent, as Mr. Pomerantz ably
8 walked Your Honor through.

9 And to be clear, Your Honor, not only does the Committee
10 believe the exculpation and injunction provisions comply with
11 Fifth Circuit law, the Committee does not believe the estate
12 is harmed by such provisions, as the Committee does not
13 believe there are any cognizable claims that could or should
14 be raised that would otherwise be affected by the exculpation
15 or injunction, and, frankly, with respect to the release that
16 Mr. Pomerantz walked Your Honor through with respect to the
17 directors and the officers.

18 Regarding the gatekeeper, Your Honor, Your Honor
19 presciently approved it in her January 9th order, and the
20 developments since then only serve as further justification
21 for including it in the plan and confirmation order. Mr.
22 Dondero is a serial and vexatious litigator, and the
23 instruments put in place under the plan to maximize value for
24 the creditors and to oversee that value-maximizing process
25 must be protected, and the gatekeeper function serves that

1 protection while also, importantly, as Mr. Pomerantz pointed
2 out, providing Mr. Dondero with a forum to advance any
3 legitimate claims he and his tentacles may have.

4 In short, Your Honor, the gatekeeper provision is
5 necessary to the implementation to the plan, is fair under the
6 circumstances of the case, and is therefore within this
7 Court's authority, and it is appropriate to approve.

8 Your Honor, in sum, it has been a long road to get here
9 today, but we are finally here. And we are here, Your Honor,
10 I believe in large part as a result of the tireless efforts of
11 the individual members of my Committee, and for that I thank
12 them.

13 The Committee fully supports and unanimously supports
14 confirmation of the plan. As demonstrated by the evidence,
15 the plan meets all the requirements of the Bankruptcy Code.
16 The Committee believes the plan is in the best interests of
17 its constituencies. And therefore the Committee, along with
18 two classes of creditors and the overwhelming amount of
19 creditors in terms of dollars, urge you to confirm the plan.

20 That's all I have, Your Honor, but I'm happy to answer any
21 questions you may have for me.

22 THE COURT: Okay. Not at this time.

23 Nate, how much time --

24 (Clerk advises.)

25 THE COURT: Twenty-five minutes remaining? All

1 right. Just so you know, you've got a collective Debtor's
2 counsel/Committee's counsel 25 minutes remaining for any
3 rebuttal, if you choose to make it.

4 Let's take a five-minute break, and then we'll hear the
5 Objectors' closing arguments. Okay.

6 THE CLERK: All rise.

7 (A recess ensued from 2:00 p.m. until 2:06 p.m.)

8 THE COURT: All right. Please be seated. We're
9 going back on the record in Highland. We're ready to hear the
10 Objectors' closing arguments. Who wants to go first?

11 MR. DRAPER: Your Honor, this -- this is Douglas
12 Draper. I get the joy of going first.

13 THE COURT: Okay.

14 CLOSING ARGUMENT ON BEHALF OF THE GET GOOD AND DUGABOY TRUSTS

15 MR. DRAPER: We've heard a great deal of testimony
16 about the Debtor's belief that the circumstances in this case
17 warrant an exception to existing Fifth Circuit case law, the
18 Bankruptcy Code, and Court's post-confirmation jurisdiction.

19 I would not be standing here today objecting to the plan
20 if the Debtor didn't attempt to extend, move past and beyond
21 the Barton Doctrine, move beyond 1141, move beyond *Pacific*
22 *Lumber*. In fact, I think I heard an argument that *Pacific*
23 *Lumber* is not applicable and this Court should disregard Fifth
24 Circuit case law.

25 Let's start with the exculpation provision. And the focus

1 of this case has been, and what we've heard over the last few
2 days, is about the independent directors. I understand there
3 was an order entered earlier, the order stands, and the order
4 is applicable in this case. It cuts off, however, when we
5 have a Reorganized Debtor, because these independent directors
6 are no longer independent directors. It cuts off when we have
7 a new general partner.

8 And so the protections that were afforded by that order do
9 not need to be afforded to the new officers and new directors
10 of the new general partner. And in fact, the protections that
11 they're entitled to are completely different than the
12 protections that were entitled -- that are covered by the
13 order that the Court has looked at.

14 Let's first focus on, however, the exculpation provision.
15 And I wanted to ask the Court to look at the exculpated
16 parties. Have to be very careful and very interest -- and
17 focus solely on the independent directors. But if you look at
18 the parties covered by exculpation provision, it includes the
19 professionals retained by the Debtor. My reading of *Pacific*
20 *Lumber* is that neither the Creditors' Committee counsel nor
21 the Debtor can be covered by an exculpation provision. This
22 in and of itself makes the plan non-confirmable. This
23 exculpation provision is unwarranted and unnecessary.

24 Two, --

25 THE COURT: Well, let's drill down on that.

1 MR. DRAPER: -- we have --

2 THE COURT: Let's drill down on that. Mr. Pomerantz
3 says that this wasn't what they considered one way or another
4 by *Pacific Lumber*. Debtor, debtor professionals. Okay? Do
5 you disagree with that?

6 MR. DRAPER: I disagree with that. *Pacific Lumber*
7 said you could only have releases and exculpations for the
8 Creditors' Committee members. And the rationale behind that
9 was that those people volunteered to be part and parcel of the
10 bankruptcy process, that those parties did not get paid.
11 Here, we have two professionals who both volunteered and are
12 being paid, and are not entitled to an exculpation under
13 *Pacific Lumber*. They're not entitled to a --

14 THE COURT: Okay. So you say *Pacific* --

15 MR. DRAPER: -- release. Now, ultimately, they --

16 THE COURT: -- *Pacific Lumber* categorically rejected
17 all exculpations except to Creditors' Committee and its
18 members. That's your --

19 MR. DRAPER: I agree. That's --

20 THE COURT: -- interpretation of *Pacific Lumber*?

21 MR. DRAPER: Yes.

22 THE COURT: Okay. All right. So you just absolutely
23 disagree, one by one, with every one of the arguments, that it
24 was really -- the only thing before the Fifth Circuit was plan
25 sponsors, okay? A plan proponent that I think was like a

1 competitor previously of the debtor, and I think a large
2 creditor or secured creditor. I think those were the two plan
3 proponents.

4 So you disagree -- I'm going to, obviously, go back and
5 line-by-line pour through *Pacific Lumber*, but you disagree
6 with Mr. Pomerantz's notion that, look, it was really a page
7 and a half or two of a multipage opinion where the Fifth
8 Circuit said, no, I don't think 524(e) is authority to give
9 exculpation from postpetition liability for negligence as to
10 these two plan sponsors. And I guess it was also -- I don't
11 know. They say, Pachulski's briefing says it was really only
12 looking at these two plan sponsors and the Committee and its
13 members on appeal, you know, going through the briefing, and
14 in such, you can see that these were all that was presented
15 and addressed by the Fifth Circuit. You disagree with that?

16 MR. DRAPER: Look, I know the facts of *Pacific Lumber*
17 and they -- I know what the posture of the case was. However,
18 the literal language by the opinion in it, it transcends just
19 a dispute in the case. And I think the U.S. Trustee's
20 position that this exculpation provision is correct as a
21 matter of law support -- is further evidence of the fact that
22 the U.S. Trustee, as watchdog of this process, and *Pacific*
23 *Lumber* say this cannot be done, period, end of story.

24 THE COURT: Okay. So you, at bottom, just totally
25 disagree with Mr. Pomerantz? You say *Pacific Lumber* is

1 actually a very broad holding, and I guess, if such, there's a
2 conflict among the Circuits, right?

3 MR. DRAPER: Well, that's okay.

4 THE COURT: So, --

5 MR. DRAPER: I mean, quite frankly, *Pacific Lumber* is
6 binding on you.

7 THE COURT: Understood.

8 MR. DRAPER: There may be a conflict in the Circuits,
9 and ultimately the Supreme Court may make a decision and
10 decide who's right and who's wrong.

11 But for purposes of today and for purposes of this
12 exculpation provision and for purposes of this confirmation,
13 *Pacific Lumber* is the applicable law.

14 THE COURT: Okay. Well, again, this is a hugely
15 important issue, although in many ways I don't understand why
16 it is, because we're just talking about postpetition acts and
17 negligence, okay? You know, many might say it's much ado
18 about nothing, but it's front and center of your objection.
19 So I guess I'm just thinking through, if the Fifth Circuit was
20 presented these exact facts and was presented with the
21 argument, you know, the *Blixseth* case says 524(e) has nothing
22 to do with exculpation because exculpation is a postpetition
23 concept, and it's just talking about standard liability --
24 these people aren't going to be liable for negligence; they
25 can be liable for anything and everything else -- if presented

1 with that *Blixseth* case, you know, there are several arguments
2 that Mr. Pomerantz has made why, if you accept that 524(e)
3 might not apply here, let's look at the reasoning, the little
4 bit of reasoning we had of *Pacific Lumber*, that it was really
5 a policy rationale, right? These independent fiduciaries,
6 strangers to the company and case, they'd never want to do
7 this if they knew they were vulnerable for getting sued for
8 negligence. Mr. Pomerantz's argument is that these
9 independent board members are exactly analogous to a
10 Committee, more than prepetition officers and directors. What
11 do you have to say about that policy argument?

12 MR. DRAPER: Well, I think there's a huge distinction
13 between the members of a Creditors' Committee who are
14 volunteers and are not paid versus a paid independent
15 director. And more importantly, I think there's a huge
16 difference between a member of a Creditors' Committee who's
17 not paid and counsel for a Debtor and counsel for a Creditors'
18 Committee.

19 THE COURT: Okay.

20 MR. DRAPER: Look, you have -- you've --

21 THE COURT: So, at bottom, it was all about
22 compensation to the Fifth Circuit?

23 MR. DRAPER: Well, no. The Fifth Circuit policy
24 decision was we want to protect a party who wants to serve and
25 do their civic duty to serve on a Creditors' Committee for no

1 compensation. I agree with that. I think it's a laudable
2 policy decision. I think it makes sense.

3 However, the Fifth Circuit in its language basically said,
4 nobody else gets it. It didn't say, look, you know, if there
5 are circumstances that are different, we may look at it
6 differently. The language is absolute in the opinion. And
7 that's what I think is binding and I think that's what the
8 case stands for.

9 And look, just so the Court is very clear, when Pachulski
10 files its fee application and the Court grants the fee
11 application, any claim against them is res judicata. So, in
12 fact, they do have -- they do have protection. They do have
13 the ability to get out from under. The Court -- they're just
14 not -- they just can't get out from under through an
15 exculpation provision. And the same goes for Mr. Clemente and
16 his firm.

17 THE COURT: Which, --

18 MR. DRAPER: And the same goes for DSI.

19 THE COURT: Which, by the way, that's one reason I
20 think sometimes this is much ado about nothing. It goes both
21 ways. The Debtor professionals, the Committee professionals,
22 estate professionals, they're going to get cleared on the day
23 any fee app is approved, right? I mean, there's Fifth Circuit
24 law that says --

25 MR. DRAPER: I -- I --

1 THE COURT: -- says that's res judicata as to any
2 future claims.

3 But I guess I'm really trying to understand, you know, at
4 bottom, I feel like the Fifth Circuit was making a holding
5 based on policy more than any directly applicable Code
6 provision.

7 I mean, it's been said, for example, that Committee
8 members, they're entitled to exculpation because of, what,
9 1103, some people argue, 1103, which subsection, (c)? That's
10 been quoted as giving, quote, qualified immunity to
11 Committees. But it doesn't really say that, right? It's just
12 something you infer.

13 MR. DRAPER: No. Look, what I think, if you really
14 want to put the two concepts together, I think what the Fifth
15 Circuit, when they told lawyers and professionals that you
16 can't get an exculpation, was very mindful of the fact that
17 you can get released once your fee app is approved. So, as a
18 policy, they didn't need to do it in a exculpation provision.
19 There was another methodology in which it could be done.

20 THE COURT: Uh-huh.

21 MR. DRAPER: And so that's -- you have to look at it
22 as holistic and not just focus on the exculpation provision.
23 Because, in fact, they recognize and they -- I'm sure they
24 knew their existing case law on res judicata, and that's why
25 they read it out.

1 So, honestly, there's no reason for Pachulski to be in
2 here. There's no reason for Mr. Clemente to be in here.
3 There's no reason for the professionals employed by the Debtor
4 to be in here. They have an exit not by virtue of the plan.

5 THE COURT: But so then it boils down to the
6 independent directors and Strand post January 9th?

7 MR. DRAPER: It boils down somewhat to them, but
8 quite frankly, there are two parts to this. One is you have
9 an order that's in place. I am not asking the Court to
10 overturn the order. And quite frankly, this provision could
11 have been written to the effect that the order that was in
12 place on -- that's been presented to the Court is applicable
13 and applied.

14 However, let's parse that down. Let's look at Mr. Seery.
15 The order that's in place solely protects the independent
16 directors acting in their capacities as independent directors.
17 If somebody's acting as -- and if you want to liken it to a
18 trustee, their protection is afforded by the Barton Doctrine,
19 and that's how the protection arises.

20 What's going on here is they're extending the provisions,
21 first of all, of the Court's order, and number two, of the
22 Barton Doctrine, which are -- which cannot be -- which should
23 not be extended. The law limits what protections you have and
24 what protections you don't have. And we, as lawyers -- look,
25 I'll give you the best example. Think of all the times you

1 had somebody write in the concept of superpriority in a cash
2 collateral order. And how many times have you had a lawyer
3 rewrite the concept of the issue as to diminution in value?
4 The Code says diminution in value, and quite frankly, a cash
5 collateral order should just say if, to the extent there's
6 diminution in value, just apply the Code section. It's
7 written there. Smart people put it in, and Congress approved
8 it. And once you start getting beyond that, those things
9 should be limited.

10 And what we have are lawyers trying to extend out by
11 definitions things that the Code limits by its reach. That
12 goes for post-confirmation jurisdiction. That goes for the
13 injunction. That goes for the so-called gatekeeper provision.

14 And so, again, I would not be here if, in fact, they had
15 said, we have an injunction to the full extent allowed by the
16 Bankruptcy Code and *Pacific Lumber*. We have an exculpation
17 provision that's allowed by virtue of the Court's order. We
18 have the full extent and full reach of the Barton Doctrine.
19 Those are legitimate. Once you start expanding upon that,
20 you're reaching into matters that are not authorized and not
21 allowed.

22 And then you get into 105 territory, which is always very
23 dangerous. And that's really what's going on here. And
24 that's the tenor of my argument and what I'm trying to say.
25 The Code gives protections. It is not for us to extend the

1 protections. It's not for us to enlarge them, even under a,
2 gee, the other party's litigious.

3 And so that's -- let's take *Craig's Store*. Attempted to
4 limit its reach. *Craig's Store* says once you have a confirmed
5 plan, any dispute between the parties, for -- let's take an
6 executory contract. If there's a breach of the executory
7 contract, that's a matter to be handled aft... by another
8 court. It's not a matter to be handled by this Court. This
9 Court lets the parties out.

10 And in this case, it's even worse, because you basically
11 have a new general partner coming in, you have an assumption
12 of various executory contracts, and you have a -- Strand is no
13 longer present.

14 If you adopted Mr. Seery's argument, anybody who appeals a
15 decision, questions what he does or how he does it, is a
16 vexatious litigator. That's not the case. And the fact that
17 we are appealing a decision is a right that we have. It
18 shouldn't be limited, and it shouldn't be held against us.
19 Courts can rule against us. That's fine.

20 And so that's really what the focus is here and that's why
21 I gave the opening that I had. We are willing to be bound by
22 applicable law. And quite frankly, the concept that the
23 exigencies of a case allow a court to change what applicable
24 law is is problematic. I gave the criminal example as a
25 reason. And the reason was that, in certain instances, the

1 application of law may allow a criminal to go free. It's a
2 problem with our system and how we work, but that's what the
3 law does, and it is absolute in its application.

4 Let me address the so-called gatekeeper provision. The
5 gatekeeper provision, in a certain sense, is recognized in the
6 Barton Doctrine. It's jurisdictional, and it says, to the
7 extent you're going to litigate with somebody who served
8 during the bankruptcy, who was a trustee, then you have to
9 come to the bankruptcy court and pass through a gate. It
10 doesn't say you have to pass through a gate for a reorganized
11 debtor who does something after a plan is confirmed and going
12 forward. And so that's -- there's a distinction.

13 And if you look at Judge Summerhays' decision, which I
14 will be happy to send to the Court, in *WRT* involving -- it's
15 kind of (indecipherable) and Mr. Pauker, where, in that case,
16 the trustee, the litigation trustee, spent more litigating
17 than it had in recoveries, and Baker Hughes filed suit. Judge
18 Summerhays said, look, the Barton Doctrine only applies to a
19 certain extent. It is limited once you get into post-
20 confirmation matters and related-to jurisdiction.

21 And so, again, the Barton Doctrine is what it stands for.
22 We agree with it, we recognize it, and it should be applied.
23 The Barton Doctrine, however, should not be extended, should
24 not go past its reach, and should not go past the grant of
25 jurisdiction for this Court.

1 And so you have in here, though they have -- they have
2 tried to hide it in a limited fashion, this gatekeeper
3 provision. The gatekeeper provision, as currently written,
4 covers post-confirmation claims that somebody has to come
5 before this Court to the extent there's a breach of a
6 contract. That's not proper, and it's not covered by your
7 post-confirmation jurisdiction. To the extent there's an
8 interpretation of an existing contract and an interpretation
9 of the order, you do have authority, and I don't question
10 that.

11 THE COURT: But address Mr. Pomerantz's statement
12 that there's a difference between saying you have to go to the
13 bankruptcy court and make an argument, we have a colorable
14 claim that we would like to pursue, and having that
15 jurisdictional step required. There's a difference between
16 that and the bankruptcy court adjudicating the claim.

17 MR. DRAPER: Well, there are two parts to that.
18 Number one is there's an injunction in place from an action
19 taken post-confirmation against property of the estate. We
20 all agree at that, correct? And we believe that the
21 injunction applies to post-confirmation action against
22 property of the pre-confirmation estate. We all agree to
23 that.

24 However, if in fact there's a breach of a contract
25 postpetition that the parties have a dispute about, that

1 contract is now no longer under your purview once the contract
2 has been assumed. And so they shouldn't have to make a
3 colorable claim to you that a breach of the contract has
4 occurred. That should be the determining factor for another
5 court.

6 That's, in essence, what *Craig's Store* says. Your
7 jurisdiction and the jurisdiction of a bankruptcy court is
8 limited. It's limited by *Stern vs. Marshall*. It's limited by
9 your ability to render findings of fact and conclusions of law
10 versus render a final decision. That decision has been made
11 not by us, it's been made by Congress and it's been made by
12 the United States Constitution.

13 THE COURT: All right. And I think we all agree with
14 you regarding the holding of *Craig's Stores* and some of the
15 other post-confirmation bankruptcy subject matter jurisdiction
16 holdings. But Mr. Pomerantz is arguing that this gatekeeping
17 function is warranted by, among other things, you know, there
18 was a district court holding, *Baum v. Blue Moon*, or a Fifth
19 Circuit case, that upheld a district court having the ability
20 to impose pre-filing injunctions in the context of a vexatious
21 litigator. So, you know, that's a strong analogy he makes to
22 what's sought here. What is your response to that?

23 MR. DRAPER: My response to that is a district court
24 can do that. A district court has jurisdiction to make that
25 decision. And quite frankly, a district court can sanction a

1 vexatious litigator under Rule 11.

2 So, in fact -- again, you have to bifurcate your power
3 versus the power that a district court has. And that
4 gatekeeper provision is allowed by a district court because
5 they had authority over the case. You may not have authority
6 over being the gatekeeper for a post-confirmation matter that
7 you had no jurisdiction over to start with.

8 THE COURT: Okay.

9 MR. DRAPER: That, that's the distinction between
10 here. That's -- what's going on here is they are -- they are
11 mashing together a whole load of concepts under the vexatious
12 litigator and the anti-Dondero function that fundamentally
13 abrogate the distinction between what your jurisdiction is
14 pre-confirmation versus your jurisdiction post-confirmation.
15 And that --

16 THE COURT: Do you think --

17 MR. DRAPER: -- is sacrosanct.

18 THE COURT: Do you think Judge Lynn got it wrong in
19 *Pilgrim's Pride*? Do you think Judge Houser got it wrong in
20 *CHC*? Or do you think this situation is different?

21 MR. DRAPER: There are two parts to that. I have
22 told Judge Lynn, since I have been working with him, that I
23 think *Pilgrim's Pride* is wrongfully decided. However, having
24 said that, *Pilgrim's Pride* and those cases dealt with claims
25 against the -- the channeling injunction affected actions

1 during the bankruptcy. It did not serve as a post-
2 jurisdictional grant of jurisdiction to the bankruptcy court.
3 It did not pose as an ability -- as a limitation on a post-
4 confirmation litigator or a post-effective date litigator to
5 address a wrong done to them by an independent director of a
6 general partner.

7 In a sense, Judge Lynn's determination, and Judge Houser,
8 is consistent somewhat with the Barton Doctrine. Now, do I
9 agree that they're right? No. But I understand the decision
10 and I understand the context in which it was rendered and I
11 don't have a huge problem with it.

12 So, again, let's parse what we're trying to do here.
13 Number one, we are -- we have to bifurcate post-confirmation
14 jurisdiction or post-effective date jurisdiction and what you
15 can do as a post-effective date arbiter versus what you could
16 do pre-effective date and pre-effective date claims. And
17 again, that's the problem with what's written here. It is
18 designed one hundred percent to expand your post-effective
19 date jurisdiction through both the gatekeeper provision and
20 the jurisdictional grant that's here from your pre-effective
21 date capability, your pre-effective date jurisdiction, and
22 your pre-effective date ability to either curb a claim or not
23 to curb a claim. And that, that's the issue.

24 And again, let's start talking about the independent
25 directors. I recognize, again, that there's an order there.

1 But if Mr. Seery -- let's take Mr. Seery -- is acting as a
2 director of Strand but is also an accountant for the Debtor
3 and makes a mistake, he would be sued in his capacity as the
4 accountant for the Debtor, not as an independent director of
5 Strand. That distinction needs to be made.

6 What we are doing here under this plan, and what's been
7 argued by Mr. Pomerantz, is too broad a brush. It needs to be
8 cut back. The Court needs to take a very hard look at what's
9 being presented here.

10 And again, the Court's order is very clear. And this is
11 binding. I recognize that. But the protection they got was
12 serving as an independent director. The protection they
13 didn't get was -- let's take Mr. Seery, if Mr. Seery was
14 serving as an accountant and blew a tax return. Those are
15 distinctions that warrant analysis and warrant looking at
16 here. And again, it is too broad a brush that's touted here,
17 and that is why this plan on its face is not confirmable with
18 respect to both the post-confirmation jurisdiction, the
19 gatekeeper provision, the exculpation provisions.

20 And so let me address a few other things, just to address
21 them. Number one, the argument has been made with respect to
22 the creditors and the resolicitation issue and that creditors
23 could have come in looking, seen, followed the case, and
24 basically calculated and made the same calculation that the
25 Debtor made when they filed this and put forth the new plan

1 analysis versus liquidation analysis. And then they've also
2 made the argument, well, nobody came and complained. Well,
3 two parts to that.

4 Number one, as you know, a disclosure statement needs to
5 be on its face and should not require a creditor to go back in
6 and monitor the record -- and quite frankly, in this record,
7 there are thousands of pages -- and do the calculation
8 himself. This was incumbent upon the Debtor to possibly
9 resolicit when these material changes took place.

10 Number two, the recalculation has not been subject to the
11 entire creditor body seeing it. And anybody who wanted to
12 call them would have had to have seen the document they filed
13 on February 1st and made a telephone call basically
14 contemporaneous with seeing it.

15 Those are two things. The argument that they didn't call
16 me is just nonsensical. There's nobody -- you, you are
17 sitting here -- and I've had a number of battles over the
18 years with Judge (indecipherable), who was -- who -- and her
19 view was, I'm here to protect the little guy who's not --
20 didn't hire counsel, who's not represented by Mr. Clemente and
21 his huge clients who have voted in favor of the plan. It's
22 the little person, *i.e.*, the employees who would vote against
23 a plan that they so -- so desperately tried to get out from
24 under.

25 THE COURT: Well, --

1 MR. DRAPER: It's really a function --

2 THE COURT: -- Mr. Pomerantz argues it's not as
3 though there was a materially adverse change in treatment; it
4 was the disbursement estimate. And doesn't every Chapter 11
5 plan -- most Chapter 11 plans, not every -- they make an
6 estimate. I mean, and it's, frankly, it's very often a big
7 range of recovery, right, a big range of recovery, because we
8 don't know what the allowed claims are going to compute to at
9 the end of the day. There's obviously liquidation of assets.
10 We don't know. Isn't this sort of like every -- not, again,
11 not every other plan, but most other plans -- where there's a
12 big range of possible estimated distributions? I mean, this
13 wasn't a change in treatment, right?

14 MR. DRAPER: Well, let me address that. There are
15 two parts to that. Most plans I see that contain some sort of
16 analysis have a range. This one doesn't have a range. What
17 they've done is they've buried in a footnote or assumption
18 that these numbers may change. So had they said, look, your
19 recovery can go from 60 cents to 85 cents, God bless, they
20 probably would have been right.

21 Number two, which is more problematic to me, to be honest
22 with you, is the fact that, number one, the operating expenses
23 have increased over a hundred percent. And number two, the
24 Debtor has made a determination post-disclosure statement and
25 pre-hearing that they're going to change their model of

1 business.

2 The original disclosure statement said we're not going to
3 get into the managing CLO part of the business and we're going
4 to let these contracts go. However, at some point along the
5 way, they made a change. I don't know to this day, because I
6 was never furnished the backup to the expense side. I
7 understand what they said why they didn't give me the asset
8 side, but the expense side, they should have given me, and I
9 did ask for.

10 But, you know, what we have now is a more fundamental
11 problem with the execution of the plan and the expectation
12 that creditors -- what they're going to get, because, in fact,
13 the expense items have doubled.

14 I think creditors were entitled to know that, rather than
15 it having been sprung upon everybody, when I got it the day
16 before a deposition. And so those are things that I think
17 warranted a change in solicitation. Now, the result may have
18 been the same. I don't know. More people may have voted
19 against the plan. More people may have opted in from Class 8
20 to Class 7, I mean, based upon that information. That
21 information was not provided to them.

22 And so I look at two -- three things. One is a range
23 could have been given, and they probably would have been a
24 whole lot better off. Two, you have a material change in
25 expenses. And three, you have a material change in business

1 model. Three things that occurred between November and this
2 confirmation hearing. Three things that were not known by the
3 creditor body and not told to them.

4 THE COURT: Mr. Draper, I --

5 MR. DRAPER: Now, it may have been told --

6 THE COURT: I don't want to belabor this any more
7 than I think we need to, but I've got a Creditors' Committee
8 with very sophisticated professionals, very sophisticated
9 members. They're fiduciaries to this constituency. You know,
10 you mentioned the little guy. I'm not quite sure who is the
11 little guy in this case. I think it's a case of all big guys.
12 But, I mean, they're fine with what's happened here.

13 Meanwhile, you -- I mean, clarify your standing here for
14 Dugaboy and Get Good. I mean, --

15 MR. DRAPER: I have --

16 THE COURT: -- I know you have standing. Mr.
17 Pomerantz did not say you don't have standing. But in
18 pointing out the economic interests here, I think he said your
19 clients only have asserted a postpetition administrative
20 expense. Is that correct?

21 MR. DRAPER: No. I have a post -- I have an -- I
22 have a claim that's been objected to. I don't think my
23 economic --

24 THE COURT: A claim of what amount?

25 MR. DRAPER: I think it's \$10 million. But Mr.

1 Pomerantz is right, it requires a looking through the --
2 through the entity that I had a loan relationship with.

3 I recognize all of those things. I don't think that's
4 relevant to whether my argument is correct or incorrect. I
5 have standing to do it. I don't think whether my claim is 50
6 cents or \$50 million should change the Court's view of whether
7 the claim is good or bad.

8 THE COURT: Well, I do want to understand, though.
9 Okay. So you have not asserted an administrative expense,
10 correct?

11 MR. DRAPER: No. There's been an administrative
12 expense that's been asserted, --

13 THE COURT: For what?

14 MR. DRAPER: -- but that --

15 THE COURT: For what?

16 MR. DRAPER: I don't have the number in front of me,
17 Your Honor. I don't -- I don't have those numbers --

18 THE COURT: Okay. Well, then, --

19 MR. DRAPER: -- in front of me. I have asserted --

20 THE COURT: -- what is the concept? What is the
21 basis for it?

22 MR. DRAPER: It deals with -- Mr. Pomerantz is
23 absolutely right as to how he's articulated it.

24 THE COURT: I can't remember what he said.

25 MR. DRAPER: It deals with -- it deals with a

1 transaction that's unrelated to the Debtor that deals with
2 Multi-Strat. I agree with that.

3 THE COURT: Okay. So I remember him saying piercing
4 the corporate veil. Your trusts -- both of them, one of them,
5 I don't know -- engaged in a transaction with Multi-Strat that
6 you say --

7 MR. DRAPER: No, that --

8 THE COURT: -- gave -- okay. Well, you say Multi-
9 Strat is liable and the Debtor is also liable?

10 MR. DRAPER: No. Let me make two things. The
11 administrative claim deals with a Multi-Strat transaction that
12 took place during the bankruptcy. My unsecured claim deals
13 with a transaction that took place prior to the bankruptcy,
14 where we lent money to another entity that then funneled money
15 out into the Debtor. We're -- our contention is that the
16 Debtor is liable for that loan.

17 THE COURT: All right. So both the administrative
18 expense as well as the prepetition claim require veil-piercing
19 to establish liability of the Debtor?

20 MR. DRAPER: Or single business enterprise. I don't
21 necessarily have to veil-pierce.

22 THE COURT: Okay. I'm not even sure that single
23 business enterprise is completely available anymore in Texas,
24 by the Texas legislature doing different things, assuming
25 Texas law applies. I don't know, maybe Delaware does. But I

1 -- sorry. Just let me let that sink in a little bit. You're

2 -- okay. Okay. Let me let it --

3 MR. DRAPER: Your Honor, I --

4 THE COURT: -- sink in a little bit.

5 MR. DRAPER: Okay.

6 THE COURT: These trusts -- of which Mr. Dondero is
7 the beneficiary ultimately, right?

8 MR. DRAPER: Yes. Well, and to --

9 THE COURT: So, your --

10 MR. DRAPER: Again, I have not gone up --

11 THE COURT: The beneficiary of your client --

12 MR. DRAPER: Mr. Dondero is --

13 THE COURT: The beneficiary of your client is
14 ultimately hoping to succeed on the administrative expense and
15 the claim on the basis that you should disregard the
16 separateness of Highland and these other entities?

17 MR. DRAPER: Well, let's take the --

18 THE COURT: When he's resisted that --

19 MR. DRAPER: -- unsecured claim. The --

20 THE COURT: -- in multiple pieces of litigation?

21 Right? I'm sorry. I'm just trying to let this sink in.

22 Okay. If you could elaborate. I'm sorry. I'm talking too
23 much. You answer me.

24 MR. DRAPER: Okay. What we are saying is that, in
25 essence, the party we lent the money to was a conduit for the

1 Debtor.

2 THE COURT: Okay. And who was that entity that
3 either --

4 MR. DRAPER: Highland Select.

5 THE COURT: -- Dugaboy or Get Good lent money to?

6 MR. DRAPER: The Get Good claim is completely
7 different. The Get Good claim is written as a tax claim.
8 Honestly, I haven't taken a hard look at it. I will, once we
9 get through this, and it may be withdrawn. The Dugaboy claim
10 is a claim that arises through a conduit loan.

11 THE COURT: Okay. But to which entity?

12 MR. DRAPER: Highland Select.

13 THE COURT: Okay. All right. Well, continue with
14 your argument. I'll get my flow chart out and --

15 MR. DRAPER: Well, let me -- again, I think I've made
16 the points that I needed to make. I think I've done it in a
17 sense that you -- what I think the Court needs to do is take a
18 very hard look at the jurisdictional extension that's being
19 granted here. I think the exculpation provision, in and of
20 itself, just by the mere inclusion of Pachulski and the
21 Debtor's professionals and the Committee professionals, is
22 just unconfirmable. It has to be stricken.

23 And I think the injunction and the juris... the gatekeeper
24 provision are not allowed by applicable law. If this plan
25 merely said, we will enforce the Barton Doctrine, we will

1 abide -- and this order the Court has entered stands, the
2 injunction that's provided and the rights that we have under
3 1141 stand, nobody would be objecting. That's why the U.S.
4 Trustee has objected, because of the expansive nature of what
5 the -- what's been done in this plan.

6 And with that, I'll turn it over to Mr. Taylor or Davor.

7 THE COURT: All right. Who's next?

8 MR. RUKAVINA: Your Honor, Davor Rukavina. Can you
9 hear me?

10 THE COURT: I can.

11 CLOSING ARGUMENT ON BEHALF OF CERTAIN FUNDS AND ADVISORS

12 MR. RUKAVINA: Your Honor, thank you. I'll try not
13 to repeat the arguments from Mr. Draper, but I do want to
14 point out a couple bigger-picture issues, I think.

15 One, the issue today is not Mr. Dondero, what he has been
16 alleged to have done, what he is alleged to do in the future.
17 The Debtor has gone out of its way to create the impression
18 that we're all tentacles, we're vexatious litigants, we're
19 frivolous litigants. The issue today is whether this plan is
20 confirmable under 1129(a) and 1129(b). And I think that that
21 has to be the focus.

22 Nor is the issue, I think, today any motivation behind my
23 objection or Mr. Draper's or anything else.

24 And I do take issue that my motivation or my client's
25 motivation has some ulterior motive for a competing plan or

1 burning down the house or anything like that. It's very, very
2 simple. My clients do not want \$140 million of their money
3 and their investors' money, to whom they owe fiduciary duties,
4 to be managed by a liquidating debtor under new management
5 without proper staffing and with an obvious conflict of
6 interest in the form of Mr. Seery wearing two hats.

7 I respect very much that Mr. Seery wants to monetize
8 estate assets for the benefit of the estate creditors. That's
9 his job. That's incompatible with his job under the Advisers
10 Act and, as he said, to maximize value to my clients and over
11 a billion dollars of investments in these CLOs.

12 That should not be, Your Honor, a controversial
13 proposition. I should not be described as a tentacle or
14 vexatious because my clients don't want their money managed by
15 someone that they, in effect, did not contract with. I may be
16 -- I may lose that argument. The CLOs have obviously
17 consented to the assumption. But my argument should not be
18 controversial. It should not be painted with a broad brush of
19 somehow being done in bad faith by Mr. Dondero.

20 And in fact, Mr. Seery has admitted that the Debtor and he
21 are fiduciaries to us. The fact that today they call us
22 things like tentacles and serial litigants and vexatious
23 litigants -- we all know what a vexatious litigant is. We've
24 all dealt with those. The fact that our fiduciary would call
25 us that just reconfirms that it should have no business

1 managing our or other people's money.

2 And then for what? Mr. Seery has basically said that the
3 Debtor will make some \$8.5 million in revenue from these
4 contracts, net out \$4 million of expenses. That's net profit
5 of \$4.5 million. But then they have to pay \$3.5 million for
6 D&O insurance and \$525,000 in cure claims. But it's the
7 Debtor's business decision, not ours.

8 Your Honor, the second issue is the cram-down of Class 8.
9 There are two problems here: the disparate treatment between
10 Class 7 and Class 8, which also raises classification, and
11 then the absolute priority rule. Class 7 is a convenience
12 class claim -- is a convenience claim, Your Honor, with a \$1
13 million threshold. Objectively, that is not for
14 administrative convenience, as the Code allows. And the only
15 evidence as to how that million dollars was arrived at was,
16 oh, it was a negotiation of the Committee.

17 There is no evidence justifying administrative
18 convenience. Therefore, there is no evidence justifying
19 separate classification. And on cram-down, the treatment has
20 to be fair and equitable, which *per se* it is not if there is
21 unfair discrimination. And there is unfair discrimination,
22 because Class 8 will be paid less.

23 On the absolute priority rule, Your Honor, I think that
24 it's very simple. I think that the Code is very clear that
25 equity cannot retain anything -- I'm sorry, equity cannot

1 retain any property or be given any property. Property is the
2 key word in 1129(b), not value. It doesn't matter that this
3 property may not have any value, although Mr. Seery said that
4 it might. What matters is whether these unvested contingent
5 interests in the trust are property. And Your Honor, they are
6 property. They have to be property. They are trust
7 interests.

8 So the absolute priority rule is violated on its face.
9 There is no evidence that unsecured creditors in Class 8 will
10 receive hundred-cent dollars. The only evidence is that
11 they'll receive 71 cents. Mr. Seery said there's a potential
12 upside from litigation. He never quantified that upside. And
13 there is zero evidence that Class 8 creditors are likely to be
14 paid hundred-cent dollars. So, again, you have the absolute
15 priority rule issue.

16 And this construct where, okay, well, equity won't be in
17 the money unless everyone higher above is paid in full, that
18 is just a way to try to get around the dictate of the absolute
19 priority rule. If that logic flies, then the next time I have
20 a hotel client or a Chapter 11 debtor-in-possession client
21 where my equity wants to retain ownership, I'll just create
22 something like, well, here's a trust, creditors own the trust,
23 I won't distribute any money to equity, and equity can just
24 stay in control.

25 The point again is that this is property and it's being

1 received on account of prepetition equity.

2 And there's also the control issue. The absolute priority
3 rule, the Supreme Court is clear that control of the post-
4 confirmation equity is also subject to the absolute priority
5 rule. Here you have the same prepetition management
6 postpetition controlling the Debtor and the assets.

7 Your Honor, the Rule 2015.3 issue, someone's going to say
8 that it's trivial. Someone's going to accuse me of pulling
9 out nothing to make something. Your Honor, it's not trivial.
10 That's part of the problem in this case, that this Debtor owns
11 other entities that own assets, and there's been precious
12 little window given into that during the case, during this
13 confirmation hearing, and in the disclosure statement.

14 Rule 2015.3 is mandatory. It's a shall. I respect very
15 much Mr. Seery's explanation that there was a lot going on
16 with the COVID and with everything and that it just fell
17 through the cracks. That's an honest explanation. But the
18 Rule has not been complied with. And 1107(a) requires that
19 the debtor-in-possession comply with a trustee's duties under
20 704(a)(8). Those duties include filing reports required by
21 the Rules.

22 So we have an 1129(a)(3) problem, Your Honor, because this
23 plan proponent has not complied with Chapter 11 and Title 11.
24 I'll leave it at that, because I suspect, again, someone will
25 accuse me of being trivial on that. It is not trivial. It is

1 a very important rule.

2 On the releases and exculpations, Your Honor, I'm not
3 going to try -- I'm not going to hopefully repeat Mr. Draper.
4 But there's a couple of huge things here with this exculpation
5 that takes it outside of any possible universe of *Pacific*
6 *Lumber*.

7 First, you have a nondebtor entity that is being
8 exculpated. I understand the proposition that, during a
9 bankruptcy case, the professionals of a bankruptcy case might
10 be afforded some protection. I understand that proposition.
11 But here you have Strand and its board that's a nondebtor.

12 The other thing you have that takes this outside of any
13 plausible case law is that the Debtor is exculpated from
14 business decisions, including post-confirmation. I understand
15 that professionals in a case make decisions, and
16 professionals, at the end of the case, especially if the Court
17 is making findings about a plan's good faith, that
18 professionals making decisions on how to administer an estate
19 ought to have some protection.

20 That does not hold true for whether a debtor and its
21 professionals should have protection for how they manage their
22 business. GM cannot be exculpated for having manufactured a
23 defective product and sold it during its bankruptcy case.

24 Here, I asked Mr. Seery whether this language in these
25 provisions, talking about whether the administration of the

1 estate and the implementation of the plan includes the
2 Debtor's management of those contracts and funds. He said
3 yes. He said yes. So if you look at the exculpation
4 provision, it is not limited in time. It affects, Your Honor,
5 I'm quoting, it affects the implementation of the plan.
6 That's going forward.

7 So you are exculpating the Debtor and its professionals
8 from business decisions, including post-confirmation, from
9 negligence. Well, isn't negligence the number one protection
10 that people that have invested a billion dollars with the
11 Debtor have? It's cold comfort to hear, well, you can come
12 after us for gross negligence or theft. I get that. What
13 about negligence? Isn't that what professionals do? Isn't
14 that why professionals have insurance, liability insurance?
15 It's called professional negligence for malpractice.

16 So this exculpation, let there be no mistake -- I heard
17 Your Honor's view and discussion -- this is a different
18 universe, both in space and in time.

19 And we don't have to worry about *Pacific Lumber* too much
20 because we have the *Dropbox* opinion in *Thru, Inc.* We have
21 that opinion. Whether it's sound law or not, I don't wear the
22 robe. But the exculpation provision in that case was
23 virtually identical. And Your Honor, that's a 2018 U.S. Dist.
24 LEXIS 179769. In that opinion, Judge Fish -- I don't think
25 anyone could say that Judge Fish was not a very experienced

1 district court judge -- Judge Fish found that the exculpation
2 violated Fifth Circuit precedent. That exculpation covered
3 the debtor's attorneys, the debtor, the very people that Mr.
4 Pomerantz is now saying, well, maybe the Fifth Circuit would
5 allow an exculpation for.

6 THE COURT: Well, I think he is relying heavily on
7 the analogy of independent directors to Creditors' Committee
8 members, saying that's a different animal, if you will, than
9 prepetition officers and directors. And he thinks, given the
10 little bit of policy analysis put out there by the Fifth
11 Circuit, they might agree that that's analogous and worthy of
12 an exculpation.

13 MR. RUKAVINA: And they might. And they might. And
14 again, I usually do debtor cases. You know that. I'd love to
15 be exculpated.

16 THE COURT: But --

17 MR. RUKAVINA: And I think, again, I do -- I do --

18 THE COURT: -- I really want people to give me their
19 best argument of why, you know, that's just flat wrong. And
20 Mr. Draper just said it's, you know, there's a categorical --

21 MR. RUKAVINA: Yeah.

22 THE COURT: -- rejection of exculpations except for
23 Committee members and Committee in *Pacific Lumber*. And I'm
24 scratching my head on that one. And partly the reason I am,
25 while 524(e) was thrown out there, the fact is there's nothing

1 explicitly in the Bankruptcy Code, right, that explicitly
2 permits exculpation to a Committee or Committee members.
3 There's just sort of this notion, you know, allegedly embodied
4 in 1103(c), or maybe there are cases you want to cite to me,
5 that they're fiduciaries, they're voluntary fiduciaries, they
6 ought to have qualified immunity.

7 And again, I see it as more of a policy rationale the
8 Fifth Circuit gave than pointing to a certain statute. So if
9 it's really a policy rationale, then I think the analogy given
10 here to a newly-appointed independent board is pretty darn
11 good.

12 So tell me why I'm all wrong, why Mr. Pomerantz is all
13 wrong.

14 MR. RUKAVINA: I am not going to tell you that you're
15 all wrong. I'm not going to tell Mr. Pomerantz that he's all
16 wrong. Although I am, I guess, a Dondero tentacle, I am not a
17 Mr. Draper tentacle, and I happen to disagree with him.
18 That's my right. I respect the man very much. I thought he
19 did a very honorable and ethical job explaining his position
20 to Your Honor. I believe that the Fifth Circuit would approve
21 exculpations for postpetition pre-confirmation matters taken
22 by estate fiduciaries. I do believe that they would. And I
23 do believe that that should be the case.

24 But again, I'm telling you that this one is different.
25 It's -- Mr. Pomerantz is misdirecting you. The estate

1 professionals manage the estate. The Debtor manages its
2 business. It goes out into the world and it manages business.
3 And as Your Honor knows, under that 1969 Supreme Court case,
4 of course I blanked, and under 28 U.S. 959, a debtor must
5 comply, when it's out there, with all applicable law.

6 So if the Debtor -- and I'm making this up, okay? I am
7 making this up. I'm not alleging anything. But if the
8 Debtor, through actionable neglect, lost \$500 million of its
9 clients' or its investor clients' money, I'm telling you that
10 under no theory can that be exculpated, and I'm telling you
11 that that's what this provision does.

12 The estate and the Debtor can release their claims. It
13 happens all the time. Whatever -- whatever claims the estate
14 may have against professionals, those can be released. It's a
15 9019. I'm not complaining about that. Although I do think
16 that it's premature in this case, because we don't know
17 whether there's any liability for the \$100 million that Mr.
18 Seery told you Mr. Dondero lost. But in no event can business
19 -- business --

20 THE COURT: I don't understand what you just said.

21 MR. RUKAVINA: Your Honor, I --

22 THE COURT: Mr. Dondero is not released --

23 MR. RUKAVINA: -- went through Mr. Seery's --

24 THE COURT: -- by the estate.

25 MR. RUKAVINA: I understand. I understand. But we

1 all have to also understand that a board of directors and
2 officers can be liable, breaches of fiduciary duty by not
3 properly managing an employee. So I'm not suggesting -- I
4 mean, I know that there's been an examiner motion filed. I'm
5 not suggesting that we have a mini-trial. I'm not suggesting
6 there's actionable conduct. What I'm telling you is that the
7 evidence shows that there's a large postpetition loss. And
8 it's premature to prevent third parties that might have claims
9 from bringing those.

10 And then I think -- I'm not sure that Your Honor
11 understood my point. Let me try to make it again. This
12 exculpation is not limited in time. This exculpation is
13 expressly not limited in time and applies to the
14 administration of the plan post-confirmation. I don't think
15 under any theory would the Fifth Circuit or any court at the
16 appellate level allow an exculpation for purely post-
17 reorganization post-bankruptcy matters. I have nothing more
18 to tell Your Honor on exculpation.

19 THE COURT: Well, again, I -- perhaps I go down some
20 roads I really don't need to go down here, but I'm not sure I
21 read it the way you did. I thought we were just talking about
22 pre -- postpetition, pre-confirmation. Or pre-effective date.

23 MR. RUKAVINA: Your Honor, Page --

24 THE COURT: The --

25 MR. RUKAVINA: Page 48 of the plan, Section C,

1 Exculpation. Romanette (iv). The implementation of the plan.
2 And I -- and that's -- that's part of why I asked Mr. Seery
3 that yesterday. Does the implementation of the plan, in his
4 understanding, include the Reorganized Debtor's management and
5 wind-down of the Funds, and he said yes.

6 THE COURT: Okay.

7 MR. RUKAVINA: So that's right there in black and
8 white.

9 It also includes the administration of the Chapter 11
10 case. If that is defined broadly, as Mr. Seery wants it to
11 be, to define business decisions, then that also exceeds any
12 permissible exculpation.

13 So, again, I'm telling Your Honor, with due respect to you
14 and to Mr. Pomerantz, that the focus of Your Honor's
15 questioning is wrong. The focus of Your Honor's questioning
16 should be on exculpation from what? From business -- i.e., GM
17 manufacturing and selling the car -- or from management of the
18 bankruptcy case? Management of the bankruptcy case? Okay.
19 Postpetition pre-confirmation managing business, never okay.

20 Your Honor, on the channeling -- and let me add, I think
21 it's very clear, there is no Barton Doctrine here. This is
22 not a Chapter 11 trustee. The Barton Doctrine does not
23 extend to debtors-in-possession. And I can cite you to a
24 recent case, *In re Zaman*, 2020 Bankr. LEXIS 2361, that
25 confirms that the Barton Doctrine does not apply to a debtor-

1 in-possession.

2 I want to --

3 THE COURT: Remind me of that --

4 MR. RUKAVINA: -- discuss, Your Honor, the --

5 THE COURT: Remind me of the facts of that case. I
6 feel like I read it, but -- or saw it in the advance sheets,
7 maybe.

8 MR. RUKAVINA: I honestly do not recall. I read it a
9 few days ago, and since then, I hope Your Honor can
10 appreciate, I've been up very late trying to negotiate
11 something good in this case.

12 THE COURT: I'd like to know --

13 MR. RUKAVINA: So, I mean, I have the case in front
14 of me.

15 THE COURT: I'd like to know about a holding that
16 says Barton Doctrine can't be applied in a Chapter 11 post-
17 confirmation context, if that's --

18 MR. RUKAVINA: Well, I have it --

19 THE COURT: -- indeed the holding.

20 MR. RUKAVINA: I have it right in front of me here,
21 Your Honor, and I can certainly -- all I know is that this
22 case held that -- it rejected the notion that the Barton
23 Doctrine applies to a debtor-in-possession.

24 THE COURT: Okay.

25 MR. RUKAVINA: And maybe --

1 THE COURT: That --

2 MR. RUKAVINA: There it is, right there.

3 THE COURT: What judge?

4 MR. RUKAVINA: Your Honor, it is the Southern
5 District of Florida, and it is the Honorable -- Your Honor, it
6 is the Honorable Mindy Mora.

7 THE COURT: Okay.

8 MR. RUKAVINA: M-O-R-A.

9 THE COURT: Okay.

10 MR. RUKAVINA: I have not had the pleasure of being
11 in front of that judge.

12 Your Honor, let me discuss the channeling injunction.
13 This is the big one for me. This is the big one. And I think
14 we have to begin -- and it's the big one, as I'll get to,
15 because Your Honor knows that the CLO management agreements
16 give my clients certain rights, and this injunction would
17 prevent those rights from being exercised post-confirmation.
18 It's not dissimilar from the PI hearing that we're in the
19 middle of in an adversary.

20 But I begin my analysis, again, with 28 U.S.C. 959. Your
21 Honor, that -- the first sentence of that statute makes it
22 very clear that when it comes to carrying on a business, a
23 debtor-in-possession may be sued without leave of the court
24 appointing them.

25 So the first thing that this channel -- gatekeeper,

1 channeling, I don't mean to miscall it -- the first thing that
2 this gatekeeping injunction does is it stands directly
3 opposite to 28 U.S.C. 959.

4 28 U.S.C. 959 also says that jury rights must be
5 preserved. As I'll argue in a moment, this injunction also
6 affects those rights.

7 In addition to 959, we have the fundamental issue of post-
8 confirmation jurisdiction. As Mr. Draper said, here, this
9 channeling injunction applies to post-confirmation matters.
10 Similar to my answer to you on exculpation, I can see there
11 being a place for a channeling injunction during the pendency
12 of a case or for claims that might have arisen during the
13 pendency of a case. I cannot see that, and I don't know of
14 any court that, at least at a circuit level, that would agree
15 that this can apply post-confirmation.

16 It is, again, the equivalent of GM manufacturing a car
17 post-confirmation and having to go to bankruptcy court because
18 someone's wanting to sue it for product negligence or
19 liability. It's unthinkable. The reason why a debtor exits
20 bankruptcy is to go back out into the community. It's no
21 longer under the protection of the bankruptcy court. That's
22 what the media calls Chapter 11, it calls it the protection of
23 the court. There's no such protection post-reorganization.
24 So, --

25 THE COURT: Is that really analogous, Mr. Rukavina?

1 Let's get real. Is this really analogous --

2 MR. RUKAVINA: It is.

3 THE COURT: -- to GM --

4 MR. RUKAVINA: It is.

5 THE COURT: -- manufacturing thousands of cars?

6 MR. RUKAVINA: It absolutely is analogous. Because
7 this Debtor is going to assume these contracts and it is going
8 to go out there and it is going to make daily decisions
9 affecting a billion dollars of other people's money. Each of
10 those decisions hopefully will be done correctly and make
11 everyone a lot of money, but each of those decisions is the
12 potential for claims and causes of action.

13 So it is analogous, Your Honor. They want my clients and
14 others to come to you for purely post-confirmation matters.
15 The Court will not have that jurisdiction. There will be no
16 bankruptcy estate, nor can the Court's limited jurisdiction to
17 ensure the implementation of the plan go to and affect a post-
18 confirmation business decision.

19 That's the distinction. The Debtor's post-confirmation
20 business is not the implementation of a plan. As Mr. Draper
21 said, there's a new entity. There's a new general partner.
22 There's a new structure. Go out there and do business,
23 Debtor. That's what they're telling you. They're telling you
24 this is not a liquidation because they're going to be in
25 business. Okay. Well, the consequence of that is that

1 there's no post-confirmation jurisdiction.

2 Now, Mr. Pomerantz says, and I think you asked Mr. Draper,
3 well, the jurisdiction to adjudicate whether something is
4 colorable is different from the jurisdiction to adjudicate the
5 underlying matter. Your Honor, I don't understand that
6 argument, and I don't see a distinction. If the Court has no
7 jurisdiction to decide the underlying matter, then how can the
8 Court have any jurisdiction to pass on any aspect of that
9 underlying matter?

10 And whether something is colorable is a fundamental issue
11 in every matter. That's the thing that courts look at in a
12 12(b)(6), in a Rule 11 issue, in a 1927 issue. So they're
13 going to come -- or someone is going to have to come to Your
14 Honor and present evidence and law that something is
15 colorable. Let's say that we've said there's a breach of
16 contract. Aren't we going to have to show you, here's the
17 contract, here's the language, here's the facts giving rise to
18 the breach, here's the elements? And Your Honor is going to
19 have to pass on that. And if Your Honor decides that
20 something is not colorable, then there ain't no step two.

21 And if Your Honor decides that something is colorable,
22 then isn't that going to be binding on the future proceeding?
23 And if it's going to be binding on the future proceeding, then
24 of course you're exercising jurisdiction to adjudicate an
25 aspect of that lawsuit.

1 I don't think that that -- I don't know I can be clearer
2 than that, Your Honor, unless the Debtor has some other
3 understanding of what a colorable claim or cause of action is
4 that I'm misunderstanding.

5 And Your Honor, I would ask, when Your Honor is in
6 chambers, to look at one of these CLO management agreements.
7 I'm sure Your Honor has already. I just pulled one out of the
8 Debtor's exhibits, Exhibit J as in Jason. And Section 14, 14
9 talks about termination for cause. Most of these contracts
10 are for cause. So, Your Honor, cause includes willfully
11 breaching the agreement or violating the law, cause includes
12 fraud, cause includes a criminal matter, such as indictment.

13 So let's imagine, Your Honor, that I come to you a year
14 from now and I say, I would like to terminate this agreement
15 because I don't want the Debtor managing my \$140 million
16 because of one of these causes. What am I going to argue to
17 Your Honor? I'm going to argue to Your Honor that those
18 causes exist. And Your Honor is going to have to pass on
19 that.

20 And if Your Honor says they don't exist, again, I'm done.
21 I just got an effective final ruling from a federal judge that
22 my claim is without merit. I'm done. Your Honor has decided
23 the matter effectively, legally, and finally.

24 That's why, when Mr. Pomerantz says that the jurisdiction
25 to adjudicate the colorableness of a claim is different from

1 adjudicating that claim, it's not correct. They're part of
2 the same thing, Your Honor.

3 We strenuously object to that injunction, we think it's
4 unprecedented, and we strenuously object to that injunction
5 because we are not Mr. Dondero.

6 I understand the January 9th order. I'll let Mr.
7 Dondero's counsel talk about why that was never intended to be
8 a perpetual order. I'll let Mr. Dondero's counsel argue as to
9 why the extension of that order *ad infinitum* in the plan is
10 illegal.

11 But even if Mr. Dondero is enjoined in perpetuity from
12 causing the related parties to terminate these agreements,
13 Your Honor, the related parties themselves are not subject to
14 that injunction. That's why you have the preliminary
15 injunction proceeding impending in front of you on ridiculous
16 allegations of tortious interference.

17 So whether the Court enjoins Mr. Dondero or not in
18 perpetuity is a separate matter. The question is, as you've
19 heard, at least my retail clients, they have boards. Those
20 boards are the final decision-makers. Mr. Dondero is not on
21 those boards.

22 In other words, it is wrong to conclude *a priori* that
23 anything that my clients do has to be at the direction of Mr.
24 Dondero. There is no evidence of that. The evidence is to
25 the contrary.

1 Yes, a couple of my clients, the Advisors are controlled
2 by Mr. Dondero. Mr. Norris testified to that. You'll not
3 find Mr. Norris anywhere testifying in that transcript that
4 Your Honor allowed into evidence that the funds, my retail
5 fund clients are controlled by Mr. Dondero. You won't find
6 that evidence. There was no evidence yesterday or today that
7 Mr. Dondero controls those retail funds. The only evidence is
8 that they have independent boards.

9 So I ask the Court to see that it's a little bit of a
10 sleight of hand by the Debtor. If I am to be enjoined or if I
11 am to have to come to Your Honor in the future as a vexatious
12 litigant or a tentacle or a frivolous litigant, whatever else
13 I've been called today, then let it be because of something
14 that I've done or failed to do, something that my client has
15 done to warrant such a serious remedy, not something that Mr.
16 Dondero is alleged to have done.

17 And what have my clients done, Your Honor? What have we
18 done to be called vexatious litigants and serial litigants?
19 We've done nothing in this case, pretty much, until December
20 16th, when we filed a motion that was a poor motion,
21 unfortunately, the Court found it to be frivolous, and the
22 Court read us the riot act.

23 We refused, on December 22nd, we, my clients' employees,
24 to execute two trades that Mr. Dondero wanted us to execute.
25 We had no obligation to execute them. We knew nothing about

1 them. And Mr. Seery -- I'm sorry. Not Mr. Dondero, that Mr.
2 Seery wanted to execute. And Mr. Seery closed those
3 transactions that same day. And then a professional lawyer at
4 K&L Gates, a seasoned bankruptcy lawyer, sent three letters to
5 a seasoned professional lawyer at Pachulski, and the letters
6 were basically ignored.

7 Okay. Those are the things that we've done. Other than
8 that, we've defended ourselves against a TRO, we've defended
9 ourselves against a preliminary injunction, we will continue
10 to defend ourselves against a preliminary injunction, and we
11 defend ourselves against this plan because it takes away our
12 rights. Is that vexatious litigation? Is that, other than
13 the frivolous motion, is that frivolous litigation?

14 And we heard you loud and clear when you read us the riot
15 act on December 16th. And I will challenge any of these
16 colleagues here today to point me to something that we have
17 filed since then that is in any way, shape, or form arguably
18 meritless.

19 So where is the evidence that my retail funds are
20 tentacles or vexatious litigants or anything else? There is
21 no evidence, Your Honor, and the Debtor is doing its best to
22 give you smoke and mirrors to just make that mental jump from
23 Mr. Dondero to my clients, effectively an alter ego, without a
24 trial on alter ego.

25 Once these contracts are assumed, the Debtor must live

1 with their consequences. It's as simple as that. Your Honor
2 has so held. Your Honor has so held forcefully in the *Texas*
3 *Ballpark* case. And the Court, I submit respectfully, cannot
4 excise by an injunction a provision of a contract.

5 Also, this injunction will -- is a permanent injunction.
6 We know from *Zale* and other cases the Fifth Circuit does
7 permit certain limited plan injunctions that are temporary in
8 hundred-cent plans. This is a permanent one. It doesn't even
9 pretend to be a temporary one.

10 It's also a permanent one because the Debtor knows and I
11 think the Debtor is banking on me being unable to get relief
12 in the Fifth Circuit before Mr. Seery is finished liquidating
13 these CLOs.

14 So what we are talking about today is effectively excising
15 valuable and important negotiated provisions of these
16 contracts, provisions that, although my clients are not
17 counterparties to these contracts, you've heard from at least
18 three of them we do control the requisite vote, the voting
19 percentages, to cause a termination, to remove the Debtor, or
20 to seek to enforce the Debtor's obligations under those
21 contracts.

22 And again, Your Honor, it's very simple. Where those
23 contracts require cause, there either is cause or is not
24 cause. If there is not cause, the Debtor has its remedies.
25 If there is cause, I'll have my remedies. But it's not for

1 this Court post-confirmation to be making that determination.
2 That's not my decision. That's Congress's decision.

3 So, Your Honor, for those reasons, we object, and we
4 continue to object, and we'd ask that the Court not confirm
5 this plan because it is patently unconfirmable. Or if the
6 Court does confirm the plan, that it excise those provisions
7 of the releases, exculpations, and injunction that I just
8 mentioned as being not in line with the Fifth Circuit or
9 Supreme Court precedent.

10 Thank you.

11 THE COURT: All right. Can I -- I meant to ask Mr.
12 Draper this. Can we all agree that we do not have third-party
13 releases *per se* in this plan? Can we all agree on that?

14 MR. DRAPER: I don't know. I have to look at that.
15 I think what you have are exculpations and channeling
16 injunctions for third parties who have not paid for those
17 channeling injunctions or those exculpations.

18 THE COURT: All right.

19 MR. RUKAVINA: Your Honor, was that question -- was
20 that question solely to Mr. Draper?

21 THE COURT: Well, no, it was to all of you. I
22 thought we could all agree that we don't have third party
23 releases *per se*. Okay. There was --

24 MR. RUKAVINA: Your Honor, we --

25 THE COURT: -- a little bit of glossing over that in

1 some of the briefing, I can't remember whose. But we have
2 Debtor releases, we have --

3 MR. RUKAVINA: Yes.

4 THE COURT: -- exculpations that deal with
5 postpetition negligence only, we have injunctions, which I
6 guess the Debtor would say merely serve to implement the plan
7 provisions and are commonplace, but Mr. Draper would say maybe
8 are tantamount to third-party releases. Is that --

9 MR. RUKAVINA: Your Honor, I don't think --

10 THE COURT: -- where we are?

11 MR. RUKAVINA: -- there's any question -- I don't
12 think there's any question that the exculpation is a third-
13 party release, and that that's also what Judge Fish held in
14 the *Dropbox* case. It says that none of the exculpated parties
15 shall have any liability on any claim. So, --

16 THE COURT: All right.

17 MR. RUKAVINA: -- that necessarily --

18 THE COURT: I get what you're saying, but I just
19 think, in common bankruptcy lingo, most people regard a third-
20 party release as when third parties are releasing -- third
21 parties meaning, for example, creditors, interest holders --
22 are releasing officers and directors and other third parties
23 for anything and everything.

24 Exculpation, I get it, it's worded in a passive voice, but
25 it is third parties releasing third parties, but for a narrow

1 thing, postpetition conduct that is negligent. Okay. So I
2 think -- while there's technically something like a third-
3 party release there, it's not in bankruptcy lingo what we call
4 a third-party release. It's an exculpation means no liability
5 of the exculpated parties for postpetition conduct that's
6 negligent. So I -- anyway, I think we all agree that, I mean,
7 can we all agree there aren't any per se third-party releases
8 as that term is typically used in bankruptcy parlance?

9 MR. RUKAVINA: I apologize, Your Honor, and I'm not
10 trying to try your patience, but I cannot agree to that.
11 Whatever claims my client, a nondebtor, has against Strand, a
12 nondebtor, are gone. Whether it's a release or exculpations,
13 they're gone. So I apologize, I cannot agree to that, Your
14 Honor.

15 MR. DRAPER: Your Honor, this is Douglas Draper. I
16 can't agree, either. I think it's definitional. And quite
17 frankly, I think I'm looking at the functional effect of
18 what's here, and they appear to be third-party releases.

19 THE COURT: Okay. All right. Who is making the
20 argument for Mr. Dondero?

21 MR. TAYLOR: Your Honor, Clay Taylor appearing on
22 behalf of Mr. Dondero.

23 THE COURT: Okay.

24 CLOSING ARGUMENT ON BEHALF OF JAMES D. DONDERO

25 MR. TAYLOR: Your Honor, first of all, as this Court

1 is well aware, this Court sits, as a bankruptcy court, as a
2 court of equity. It has many different tools available to it.
3 One of those, of course, is denying confirmation of this plan
4 because of the laws that we have discussed today and that we
5 believe the evidence has shown, and I won't go into those. Of
6 course, of course, Your Honor could confirm that plan. Yet
7 another tool available to this Court is it can take it under
8 advisement.

9 To the extent that this Court decides to confirm this plan
10 and decides to confirm it today, it certainly takes a lot of
11 options off the table for all parties. There are ongoing
12 discussions, I'm not going to go into any of the particulars
13 of those discussions, but a ruling on confirmation today would
14 effectively end that, because, absent, then, an order vacating
15 confirmation, there's a lot of eggs that can't become
16 unscrambled after a confirmation order is entered.

17 So we would respectfully ask that, to the extent that the
18 Court is even considering confirmation, we don't believe it to
19 be appropriate, but at least take it under advisement for 30
20 days, or at least, in the very alternative, that it announce
21 some date which it is going to give a ruling, so that we kind
22 of know when that is going to come down, to see if any
23 positive ongoing discussions can result in more of a global
24 resolution that all parties can agree upon.

25 Addressing more the merits of the case, Your Honor, Mr.

1 Dondero does indeed object to the nondebtor releases, the
2 exculpations, the injunction. I believe those have been
3 covered rather extensively in the prior argument, so I wasn't
4 going to go into those here because they've been addressed.
5 Of course, I will endeavor to answer any questions that Your
6 Honor may have on those.

7 I will say I think Your Honor asked for everybody's best
8 shot as to why this is different for a Committee member versus
9 the independent trustees here. I will say my best shot is,
10 first of all, *Pacific Lumber* says what it says. I believe Mr.
11 Pomerantz has indicated their position that that language is
12 dicta and therefore not binding upon this Court. I
13 respectfully disagree with that. But to the extent, more
14 directly answering Your Honor's question, to me, the
15 difference is clear. Chapter 7 trustees are a creature of
16 statute. So are Chapter 11 trustees. And -- as are members
17 of a Committee that are seated pursuant to the Bankruptcy
18 Code. Those are all creatures of statute. And the
19 independent board of trustees, while there are certainly --
20 there are some analogies that can be made, undoubtedly, but
21 they are not a creature of statute. There is no provision for
22 them under the Bankruptcy Code. And therefore I don't believe
23 that they should and can receive the same protections under
24 *Pacific Lumber*.

25 And so hopefully that -- that is my best shot at

1 answering, directly answering the question that Your Honor
2 posed.

3 THE COURT: Okay.

4 MR. DRAPER: Mr. Dondero also has issue with the
5 overbroad continuing jurisdiction of this Court. I believe
6 Mr. Rukavina has stated that rather succinctly, too. Merely
7 ruling upon whatever claim is colorable or not certainly has
8 definite impacts. If this Court has jurisdiction to do that
9 when it otherwise wouldn't have jurisdiction, it enacts an
10 expansion, a potentially impermissible expansion of this
11 Court's jurisdiction. And for that reason, the plan should --
12 confirmation should be denied.

13 Getting into the particulars of 1129, Your Honor, there is
14 problems under 1129(a)(2). Those are the solicitation
15 problems. Let's just kind of look at what the evidence
16 showed. On November 28th, there was a disclosure statement,
17 it was published to all creditors, and it said, under this
18 plan, you're going to get 87 cents. It wasn't a range. Now,
19 there was some assumptions that went in there, but they said,
20 under a liquidation of all these assets, you're going to get
21 62 cents.

22 The Debtors came back approximately two months later, on
23 January 28th, and said, oh, wait, we missed the boat here, and
24 actually, under the plan, you're going to get 61 cents. And
25 under a liquidation, though, you'd only get 48.

1 Well, the problem is, already, two months later, they've
2 already told you they missed the boat on what the liquidation
3 analysis was just two months ago. And two months ago, they
4 told you under a liquidation you'd get 62 cents, and now we're
5 telling you you're going to get less. That's at least some
6 very good evidence that the best interests of the creditors
7 isn't being met, and potentially a liquidation is much better.

8 They then came back, potentially maybe realizing that
9 problem, also because some new information came in with the
10 employees, and also with UBS, which adjusted the overall
11 general unsecured claims pool, and said, well, under the plan
12 you're going to get 71 cents, and under a liquidation you're
13 going to get 55 cents.

14 In between those iterations from November to February,
15 they found \$67 million more in assets. So Mr. Seery testified
16 he believed some of that's as to market increases in values,
17 and some (garbling) investment, market -- securities. And
18 some were just in these private equity investments.

19 There are indeed some rollups behind all of these numbers.
20 I do understand why they wouldn't want to make some of these
21 numbers public, because they might not be able to get --
22 create the upside for any particular asset class that they're
23 seeking to monetize.

24 However, we and others, including Mr. Draper, asked for
25 those rollups to be provided, and we certainly could have

1 taken those under seal or a confidentiality agreement, could
2 have also put those before this Court under seal and the
3 Debtor could have put those rollups before this Court under
4 seal. It elected not to do so.

5 So, rather, what you have is the naked assumptions of this
6 is what we think we can monetize the assets, or we're not
7 going to tell you what it is, but trust me, Creditors, and
8 cool, we found \$67 million worth of value in the past two
9 months, so therefore we're going to beat the liquidation
10 analysis that we previously told you just two months ago.

11 They also acknowledge that, in those two months, that
12 there was going to be about \$26 million in increased costs
13 from their November analysis to their February analysis. And
14 they included that in their projections.

15 Finally, they acknowledged, in those two months, that we
16 had previously estimated -- and they even have it in their
17 assumptions in November liquidation and plan analysis -- that
18 UBS, HarbourVest, and I believe it was Acis, were all going to
19 be valued at zero dollars, and that's what the claims were
20 going to be. Well, they kind of missed the boat on those, and
21 they missed it by a lot. They -- it increased all the claims
22 in the pool from \$195 million to \$273 million, or sorry, I
23 don't -- look at that again, but it was an increase of \$95
24 million. I'm sorry, 190 -- the claims pool increased from
25 \$194 million to -- I'm sorry, Your Honor, I have too many

1 papers in front of me -- on November, the claims pool was 176
2 and it increased by February 1st to 273. Therefore,
3 approximately \$95, almost \$100 million worth of claims that
4 they weren't anticipating that actually came in.

5 That tells you about the quality of the assumptions that
6 went into the analysis to begin with. They missed it by 50
7 percent on what the overall claims pool was going to be.
8 That's significant. It's material.

9 There is a lot of other assumptions that could go into
10 this document, and one of those assumptions are how much are
11 we going to be able to monetize these assets for? One other
12 assumption is, well, how much is it going to cost during the
13 two-year life of this wind-down? Another assumption is going
14 to be, are we actually going to be able to wind down in two
15 years? Because if we're not, well, guess what, all those
16 costs are going to go up. Another assumption is, well, how
17 much are those fee claims going to be over the two-year
18 period? Again, if it goes over two years, they're going to be
19 significantly higher. Moreover, you might have just missed
20 what the burn rate is.

21 So I think it's rather telling that the assumptions made
22 of -- all the way back of over two -- of only two months ago
23 were off by \$100 million, and therefore it skewed all of the
24 plan-versus-liquidation analysis all over the board.

25 That's the only evidence that the Debtor has put forth as

1 to why it's in the best interest of the creditors. And quite
2 frankly, we don't believe they have met their burden. And it
3 is their burden to prove to Your Honor that the plan is better
4 than what a Chapter 7 trustee will -- can do.

5 What the evidence does show, as far as what the plan would
6 do as compared to a hypothetical Chapter 7 trustee, is that we
7 know for sure that the Claimant Trust base fee, just over the
8 two years, is going to be \$3.6 million.

9 (Interruption.)

10 MR. TAYLOR: I'm sorry.

11 THE COURT: Someone needs to put their device on
12 mute. I don't know who that was.

13 MR. TAYLOR: Oh, I'm sorry. I thought you said
14 something, Your Honor.

15 THE COURT: No.

16 MR. TAYLOR: So what we do know is the Claimant
17 Trustee base fee is going to be \$3.6 million. What we don't
18 know and what was not put into evidence because they are still
19 negotiating it is there's going to be a bonus fee on top of
20 that that's going to be paid to Mr. Seery. Is that \$2
21 million? Is that \$4 million? Is that \$10 million? Well, we
22 don't know. We can't perform that analysis as compared to
23 what a hypothetical Chapter 7 trustee could be. Nor can Your
24 Honor, based upon the evidence presented.

25 And quite frankly, I don't see how one could ever conclude

1 -- and there are some other unknowns that we're about to go
2 over, including the Litigation Trust base fee and there are
3 collection fees, contingency fees. Those are also to be
4 negotiated. To be negotiated and unknown. You can't perform
5 the analysis. The Debtor couldn't perform the analysis
6 because those are to be negotiated, so you can't tell whether
7 a Chapter -- hypothetical Chapter 7 trustee might come out
8 better because he's not going to incur all these costs. We
9 know that they're going to incur D&O costs.

10 THE COURT: Let me interject right now.

11 MR. TAYLOR: Sure.

12 THE COURT: Again, I'm going to go back to
13 understanding who your client is arguing for. Okay? Again,
14 as we've said before, Mr. Pomerantz did not technically say no
15 standing, but he thought it was important to point out the
16 economic interests that our Objectors either have or don't
17 have. Okay?

18 So I'm looking through my notes to see exactly what the
19 Dondero economic interest is. I have something written in my
20 notes, but I'm going to let you tell me. Tell me what his
21 economic interests are with regard to this Debtor, this
22 reorganization.

23 MR. TAYLOR: Your Honor, I believe he has been placed
24 into Class 9, Subordinated Claims. So to the extent that
25 there is recovery available to Class 9, he can recover on

1 those claims.

2 THE COURT: But what proof of claim --

3 MR. TAYLOR: We also have --

4 THE COURT: What proof of claim does he have pending
5 at this juncture?

6 MR. TAYLOR: Your Honor, I would have to go back and
7 look. I don't have the proofs of claim register in front of
8 me. And I'm sorry, if I tried to speculate, I would be doing
9 a disservice to my client and this Court by trying to
10 speculate. I did not prepare those proofs of claim. People
11 in my firm did. But I would be merely speculating if I tried
12 to give you an answer off the spot. And I apologize. I'm
13 happy to submit a post-confirmation hearing letter --

14 THE COURT: No, no, no.

15 MR. TAYLOR: -- as to that.

16 THE COURT: I'm not going to allow one more piece of
17 paper in connection with confirmation. I thought you would be
18 able to answer that.

19 MR. TAYLOR: I'm sorry. I just don't want to lie to
20 Your Honor.

21 THE COURT: What about his -- what would be an
22 indirect equity interest?

23 MR. TAYLOR: Well, again, there are a lot of people
24 that know this org chart a lot better than me. This is me
25 going on hearsay myself. But I understand he also owns a lot

1 of indirect interests in subsidiaries, some of which are
2 majority, some of which are minority, and some of which he
3 owns maybe directly, some of which through other entities. So
4 the way in which these assets could be monetized at the sub-
5 debtor level could certainly impact his economic rights and
6 could impact him greatly. For instance, if the --

7 THE COURT: I really wanted an exact answer.

8 MR. TAYLOR: Mr. Seery --

9 THE COURT: I really wanted an exact answer, not just
10 he has an indirect interest in, you know, some of the 2,000 --
11 I'm not going to say tentacles, but --

12 I'm going to interrupt briefly, because I really want to
13 nail down the answer as best I can. Mr. Pomerantz, can you
14 just remind me of what your answer was or statement was
15 regarding Mr. Dondero, individually, his economic stake in all
16 this?

17 MR. POMERANTZ: He has an indemnification claim
18 that's been objected to, --

19 THE COURT: That's the one and only --

20 MR. POMERANTZ: -- although it's not before --

21 THE COURT: That's the one and only pending proof of
22 claim, right?

23 MR. POMERANTZ: That's my understanding. And while
24 it's not before the Court, we could all imagine whether Mr.
25 Dondero's going to be entitled to indemnification.

1 He has an interest in Strand, which is the general
2 partner.

3 THE COURT: Right.

4 MR. POMERANTZ: And Strand owns a quarter-percent --
5 a quarter of one percent of the equity. I believe that is all
6 of Mr. Dondero's economic interest in the Debtor.

7 THE COURT: Okay. So, again, I'm just trying to, you
8 know, understand who he's looking out for, for lack of a
9 better way of saying it, Mr. Taylor, in making these
10 arguments.

11 MR. TAYLOR: So, there is also, and this is -- I'm
12 not involved in what are these going to be filed collection
13 suits, or some of which have been filed, some of which have
14 not been filed, none of which I believe the answer date has
15 been -- has passed or come to be yet.

16 But he is also a defendant in collection suits on these
17 notes, as you are undoubtedly aware.

18 THE COURT: Okay. He's a defendant in adversary
19 proceedings. Okay? That makes him a party in interest to --
20 well, I keep -- that makes him have standing to make an
21 1129(a)(7) argument? That's why I'm going down this trail.
22 Because you've spent the last five minutes talking about, you
23 know, creditors could do better in a Chapter 7 liquidation.
24 I'm not sure he has standing to make that argument, so I'm
25 wanting you to address that squarely.

1 MR. TAYLOR: Your Honor, I believe he has economic
2 interests up and down the capital structure. And I cannot
3 describe to you, without wildly speculating and potentially
4 lying to this Court, which I'm not going to do, without some
5 time to have looked at that, because I was -- I was not
6 involved in the proofs of claim and I am not his accountant.
7 So I could not do that without wildly speculating, so I just
8 -- I would like to more directly answer your question, Your
9 Honor. I am not trying to avoid the question. But I can't
10 honestly answer your question with true facts as we sit here
11 right now.

12 THE COURT: All right. But do you agree or disagree
13 with me that only parties -- the only parties that really can
14 make an 1129(a)(7) argument are holders of claims or interests
15 in impaired classes?

16 MR. TAYLOR: Your Honor, I believe that Mr. Dondero
17 has standing to do so by virtue of claims for indemnification
18 --

19 THE COURT: Okay.

20 MR. TAYLOR: -- if these -- if these -- if this
21 Debtor (indecipherable) able to meet its obligations to
22 indemnify him. And some of those are significant claims that
23 are being brought against him that could total millions, if
24 not tens of millions of dollars, just in defense costs alone,
25 that I do believe give some standing.

1 THE COURT: Okay. So, assuming you're right, you
2 think the evidence does not show this is better than a Chapter
3 7 liquidation where we would have a stranger trustee come in
4 and just, yeah, I guess, cold-turkey liquidate it all.

5 MR. TAYLOR: Your Honor, I do believe that the
6 evidence shows that the Debtor hasn't met its burden as to
7 this. A Chapter 7 trustee doesn't necessarily have to
8 liquidate immediately. It can run these -- these assets. I
9 mean, Mr. Seery is going to do it with ten people. At one
10 time, just two months ago, he said he was going to do it with
11 three people. A Chapter 7 trustee could certainly have a
12 limited runway, or even an extended runway, if it so asked for
13 it, to liquate these Debtors.

14 Moreover, there would be at least the requirements that
15 the Chapter 7 trustee would request the sale, tell creditors
16 about it. And, as many courts have said, the competitive
17 bidding process is the best way to make sure that you ensure
18 the highest and best offer that you can get.

19 Mr. Seery has not committed to providing notice of sales
20 to creditors and other parties in interest, potentially
21 bringing them in as bidders. They -- he could name a stalking
22 horse, but he has not indicated any desire to do so. A
23 Chapter 7 trustee would endeavor to do so.

24 So I do believe that there are some advantages. And
25 you've heard no testimony that they've performed any analysis

1 or conducted any interviews with any Chapter 7 trustees as to
2 whether or not this was possible or not. They just made the
3 naked assumption that they would do work based upon what they
4 said was their experience. And Mr. Seery's deposition, when
5 it was taken and noticed as a 30(b)(6) deposition, and I
6 believe it has been entered into evidence here, he said the
7 last time he dealt with a Chapter 7 trustee was 11 or 13 years
8 ago, and it was the *Lehman* case, and that was the -- a SIPC
9 trustee. So --

10 THE COURT: Well, --

11 MR. TAYLOR: -- that's the last time he had any
12 experience with it.

13 THE COURT: -- again, I don't mean to belabor this
14 point, just like I didn't mean to belabor a few others. But,
15 you know, there is a mechanism, yes, in Chapter 7, Section
16 704, for a trustee to seek court authority to operate a
17 business. But it's not a statute that contemplates long-term
18 operation. Okay? It's just, oh, we've got a little bit of --
19 you know, we have some assets here that really require a
20 short-term operation here.

21 If it's long-term, then you convert to Chapter 11. Okay?
22 It's just a temporary tool, Section 704. Right? Would you
23 agree with me?

24 MR. TAYLOR: That's typically how it has been used.

25 THE COURT: Okay.

1 MR. TAYLOR: But that's not to say that it's limited
2 in time by the statute itself. It doesn't say that it can't
3 go for one year or two years. That can be a short wind-down
4 period.

5 THE COURT: But hasn't your client's argument been
6 this past several weeks that Mr. Seery is moving too fast,
7 he's wanting to sell things and he needs to hold them longer?
8 I mean, these two argument seem inconsistent to me.

9 MR. TAYLOR: So, just because a Chapter 7 trustee has
10 been appointed doesn't mean that he has to sell them any
11 faster than Mr. Seery.

12 I think what the -- the problem with the process that has
13 been going on with Mr. Seery, my client's problem with it, is
14 not necessarily the timing but the process that Mr. Seery is
15 going through with these sales. Provide notice, allow more
16 bidders to come in, make sure that he's getting the highest
17 and best price. And if that happens to be Mr. Dondero who
18 offers the highest and best price, great. And if Mr. Dondero
19 gets outbid by somebody, well, that's all the more better for
20 the estate.

21 THE COURT: Okay. Continue your argument.

22 MR. TAYLOR: I believe we covered a lot of it, Your
23 Honor, and the plan analysis is all based upon their
24 assumptions that there's \$257 million worth of value. Again,
25 there's no rollup provided as to how that asset allocation is

1 broken out, but they consist of a couple of items.

2 First, there's the notes; and second, there's the assets.

3 The notes are either long-term or demand notes. Those long-
4 term notes, Mr. Seery will tell you some have been validly
5 accelerated and therefore are now due and payable. I think
6 there's arguments to the contrary. But those long-term notes
7 probably have some both time value of money and collection
8 costs. And then, of course, you have to discount them by
9 collectability issues, too.

10 I don't believe any analysis went into it, or at least the
11 Court was not provided any data or analysis as to what
12 discounts were applied to those notes. And, therefore, I
13 don't think that this Court can make any determination that
14 the best interests of the creditors have been met.

15 As far as the assets that are to be monetized, again,
16 there's two sub-buckets of those assets. There's securities
17 that are to be sold. Some of those are semi-public securities
18 that have markets. Those are somewhat more readily
19 ascertained. The others are holdings in private equity
20 companies, and sometimes holdings in companies that own other
21 companies.

22 There's no evidence of the value -- empirical evidence of
23 the value of those companies, nor of the assumptions that went
24 into as to when they should be sold, how much they'd be sold
25 for.

1 Again, I do realize the sensitive nature of such
2 information, but that could have been placed under seal. And
3 without that information, I don't believe that the Court can
4 conduct the due diligence it's necessary to say the best
5 interest of the creditors have been met.

6 To sum up, Your Honor -- oh, I'm sorry. One other point
7 that I did want to talk about before I summed up is, you know,
8 Mr. Pomerantz and I were listening to a different record or I
9 was totally confused as to the testimony that was put forth
10 regarding the directors and officers. I believe the testimony
11 in the record is extremely clear that the Debtor made no
12 effort to go out and find out if it could obtain directors and
13 officers insurance without a gatekeeping injunction or a
14 channeling injunction, whatever you want to call it. I
15 believe that his testimony was extremely clear. He didn't
16 shop it. He doesn't know. And that's what the record is
17 before this Court.

18 To the extent that the Debtor wants to rely upon we can't
19 get Debtor -- or, directors and officers insurance because
20 without this gatekeeping function we just can't get it, I
21 believe the record just wholly does not support that. The
22 testimony was at least extremely clear, as how I heard it.
23 Your Honor will have to review the record herself, but I don't
24 believe that there was much argument about it.

25 I'm sure -- as I stated in the beginning, Your Honor, this

1 is a court of equity. It could deny confirmation, as I
2 believe Your Honor should, based upon the flaws in the plan.

3 If Your Honor finds that the plan as written is
4 impermissible because of any of the exculpation or the
5 gatekeeping functions that they're asking, the testimony is
6 equally clear that the independent directors would not serve
7 in -- as officers of the Reorganized Debtor. Any plan that is
8 put forth by the Debtor has to tell the people who are going
9 to be officers going forward. And with that naked testimony
10 before the Court, that it's simply not feasible, and I don't
11 think it is one of the possible -- where the Court can come
12 back and say, well, I can't confirm this plan as written, but
13 if you change it and rewrite it to get rid of the certain
14 offensive parts of the exculpation or the gatekeeping
15 functions, then we can confirm this plan. And I think the
16 evidence before this Court is it's not feasible because none
17 of the directors will serve in that capacity, and therefore
18 this plan should be dead on arrival if Your Honor agrees the
19 proposed provisions do not meet *Pacific Lumber*.

20 We would ask the Court to deny confirmation, but in the
21 alternative, to at least take this under advisement. Give us
22 a time frame -- we'd ask for 30 days -- but give us a time
23 frame of when the Court is going to rule, to allow the
24 positive conversations to move forward.

25 To that end, Your Honor, there is, indeed, a hearing on

1 the extension of a temporary injunction and contempt that is
2 scheduled for Friday. I understand that the parties, at least
3 the joint parties, will not -- will agree to, I'm sorry, will
4 agree to the extension of the temporary injunction until such
5 time as the Court can rule on confirmation. I do see that
6 there could be a lot of harm done at the Friday hearing. We
7 would ask that the Court additionally continue that hearing on
8 that motion and on the injunction, and contempt, until such
9 time as confirmation has been ruled upon. It will be both
10 efficient and allow discussions to continue regarding
11 potential global resolution.

12 And so that is the end of my argument, Your Honor.

13 THE COURT: All right. Thank you. All right. Mr.
14 Pomerantz, do you have any rebuttal?

15 REBUTTAL CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

16 MR. POMERANTZ: Yes, I do, Your Honor. I want to
17 address a couple of comments that Mr. Taylor made towards the
18 end. First of all -- and, actually, the beginning.

19 We think Your Honor should rule on confirmation. Ruling
20 on confirmation and having an entered confirmation order are
21 two separate things. We understand that a new offer was made.
22 Whether that's acceptable to the Committee -- I actually think
23 it will enhance the ability of the parties to see if they
24 could reach a deal if there's (audio gap) that Your Honor is
25 going to confirm the plan.

1 Again, doesn't mean a confirmation order has to be
2 entered, but I think, based upon my personal experience in
3 negotiating with Mr. Dondero, that your clear communication to
4 the parties that, unless something happens, you will enter a
5 confirmation order, I think will change things. Okay?
6 Without getting into settlement discussions, things have
7 changed over the last several days, and we wish you would have
8 -- wish things would have happened sooner. But we totally
9 disagree that Your Honor should hold your ruling for 30 days
10 or any other period of time.

11 Part of the reason I think they are making that argument
12 is because they have an examiner motion and they recognize
13 that, upon confirmation, the examiner motion is moot. So I
14 think there's strategic reasons as well.

15 We don't think there should be a continuance of the TRO
16 hearing and of the contempt hearing. As Your Honor recalls,
17 the contempt motion was specifically set for this time to give
18 Mr. Dondero enough time to prepare. Your Honor was sensitive
19 to his due process concerns. We set the TRO, the preliminary
20 injunction hearing against the Advisors and the Funds, we set
21 that, again, knowing that it would be after confirmation.

22 So we do not agree that either should be continued.
23 Again, we think the more direct, unequivocal answers Your
24 Honor can give to the parties, the better off we'll be.

25 I guess -- Mr. Taylor and I do agree that the record was

1 clear. I guess we just disagree on the clarity of it. I
2 heard Mr. Tauber testify that when he went out to people, to
3 insurance carriers, after he and Aon were engaged, they all
4 talked about a Dondero exclusion. Okay? They weren't
5 convinced into a gatekeeper provision because it was provided
6 as part of the normal materials you would provide in a
7 bankruptcy court and trying to get D&O liability in the
8 context of a bankruptcy case. Mr. Tauber's testimony was
9 pretty clear, that carriers wanted to have a Dondero
10 exclusion. And, in fact, the only reason we were able to get
11 any coverage was because of the gatekeeper.

12 So, yes, the record was clear. We just disagree.

13 I'd like to go back to Mr. Draper's comments going -- and
14 a couple of things, obviously, overlap. I guess one of the
15 things here, it's great that everyone is coming in here as
16 different interests and different parties or whatnot. But as
17 I mentioned, Your Honor, at the outset, and I've repeated a
18 few times, these are all -- the only people we have not been
19 able to resolve issues with are the Dondero parties and the
20 related parties. And I recall the tentacles. Mr. Davor
21 questioned that. Mr. Clemente, his comments. But the fact of
22 the matter is, Your Honor, Your Honor has heard testimony.
23 Your Honor has had hearings. Mr. Rukavina represents the
24 Advisors and the Funds. Your Honor has never seen the
25 independent board member testify in this case to demonstrate

1 how these entities are really different. So while Mr.
2 Rukavina does -- you know, tries his best, and I think he has
3 limited stuff to work with, but I give him credit for doing
4 the best he can, these are all Dondero-related entities and
5 Your Honor has seen that.

6 So, Your Honor, going to the resolicitation argument, it
7 actually has taken up a lot more time than the argument is
8 worth, for one very simple reason. As I said in my argument,
9 and as Mr. Taylor and Mr. Draper totally ignored, there were
10 17 creditors who voted yes, 17 creditors who were apparently
11 misled, that Mr. Draper is looking out for the little guy and
12 Mr. Taylor is fumbling over his reason for why that's
13 important to Dondero. And of those 17 creditors that voted
14 yes, Your Honor, they were either the employees related to
15 HarbourVest, UBS, Redeemer, or Acis, except for two. And you
16 know the other two? One was Contrarian, a claim buyer, who,
17 yeah, elected to be in Class 7, and the other was an employee
18 with a dollar claim.

19 So the whole argument that there should be a
20 resolicitation is preposterous, Your Honor. But to go to some
21 of the specifics in what they argued, we didn't require
22 creditors to monitor recovery. The footnote -- as I
23 indicated, the UBS 3018 was in the disclosure statement that
24 went out. It didn't make it to the projections. It was
25 clearly -- and they characterize it, I think Mr. Draper

1 characterized it as buried in the document. There is a
2 section that every disclosure statement is required to have
3 called Risk Factors. This disclosure statement had that. And
4 in the disclosure statement, it talked about the amount of
5 claims being a risk factor.

6 Mr. Draper also said that the Debtor totally changed its
7 business model from the first to the second analysis. That is
8 incorrect. The Debtor was always going to manage funds. Yes,
9 did they add the CLOs? But before, they were going to manage
10 Multi-Strat, they were going to manage Restoration Capital,
11 they were going to oversee Korea, they were going to be doing
12 the management of the funds. So there wasn't a big change in
13 the business model, Your Honor.

14 Mr. Taylor, on the solicitation issue, says we found \$67
15 million in assets. You know, that's a disingenuous statement.
16 I think over \$20 million was found because his client and
17 related entities didn't make a payment on notes and they got
18 accelerated. So while before we would have had to wait over
19 time if they were paid, it's not surprising that Mr. Dondero
20 and his related entities just failed to basically pay the
21 notes.

22 So that was, I think, over \$20 million. And then there
23 was the HCLOF asset. That was acquired in the HarbourVest
24 settlement. And then there was basically an increase in some
25 value to some assets.

1 So there wasn't anything mysterious here. There wasn't
2 anything that the Debtor was trying to hide. There weren't
3 any found assets. It was based upon different circumstances.

4 Mr. Taylor complains about the lack of rollup of assets,
5 the lack of evidence on the best interests of creditors test.
6 Your Honor, you've had extensive testimony from Mr. Seery
7 about what would happen in a Chapter 7 and what would happen
8 in a Chapter 11. And you know why we didn't provide the
9 information to Mr. Taylor and his client on what the rollup of
10 the assets would be, and do you know why he wants them? He
11 wants to know what the assets are so he can try to bid.

12 And there also was the allegation that the failure to
13 allow them to bid means we're going to get less in a Chapter
14 11 than a 7. Two comments to that, Your Honor. Number one,
15 if that was the case, a debtor would never be able to satisfy
16 the best interests of creditors test. If the existence of a
17 public process *de facto* meant you would get more value than
18 outside, you would never be able to satisfy that. And, quite
19 honestly, that's just not the law, Your Honor.

20 You have an Oversight Committee with over \$200 million of
21 creditors who are going to watch Mr. Seery like a hawk, like
22 they have watched him during the case. And the concern that
23 somehow, because these assets are not put into full view to
24 sell, that they will get less value, it's just not -- it's not
25 supported by the evidence at all, Your Honor. And Mr. Seery

1 will make the determination. If it makes sense to notice up
2 and provide Mr. Dondero with notice, he will. If he doesn't,
3 he won't.

4 Your Honor, going -- oh, and then the last comment on the
5 -- that I'll make on the resolicitation and the liquidation
6 analysis is Mr. Taylor chides us and we've been criticized for
7 not disclosing more about the HarbourVest and the UBS
8 settlements and that we were off substantially. Your Honor,
9 you've heard testimony that we were in pending litigation with
10 HarbourVest and UBS at the time. What kind of litigant would
11 we be if we came in and said, you know, Your Honor, you know,
12 Creditors, we think the UBS claim is going to be allowed at
13 \$60 million and we think the HarbourVest claim is going to be
14 allowed at \$30 million? Would that really have benefited
15 creditors and this estate, to basically, after we took the
16 position, hard negotiations and hard pleadings that we
17 prepared, and in some cases filed, that we didn't have any
18 liability? It would have made no sense, and it would have
19 been a dereliction of our duty to actually come out and say
20 what the claims -- the claims were, or what we thought they
21 could be settled for.

22 Your Honor, going back to Mr. Draper's comments. He
23 started with the exculpation. First he made a comment that I
24 don't think he intended what he said, but he said that the
25 exculpation order, the January 9th order, cuts off when the

1 independent directors go away. I think what he meant to say
2 is that since the three people are not going to be independent
3 directors anymore, that basically any actions going forward by
4 any of those three are not covered. But let's be clear. The
5 January 9th order is in effect, and if at some point in the
6 future somebody has a claim against those three gentleman, or
7 their agents, for what they did as independent directors or
8 their agents, that order will apply.

9 Your Honor, we next had a discussion, or Mr. Draper and
10 you had a discussion on professionals. I'm aware of the Fifth
11 Circuit law that says *res judicata*, fee applications. I think
12 that only applies to claims that the Debtor and estate would
13 have. It doesn't really apply to an exculpation. But there's
14 Texas state law that I identified in our brief and we cited to
15 that limits third parties' ability to go after professionals.

16 But the bottom line is the Fifth Circuit, in *Pacific*
17 *Lumber*, didn't deal with professionals. Your Honor was
18 correct in pushing both Mr. Taylor and Mr. Rukavina. What
19 really that was was a policy case. And professionals have
20 nothing to do with 524(e). So the *Palco* and the *Pacific*
21 *Lumber* reference and explanation of 524(e) doesn't have
22 anything to do with professionals. And we would submit, Your
23 Honor, that an exculpation, especially in a case like this, is
24 important for professionals.

25 I understand Your Honor's comments that maybe it's much

1 ado about nothing, but I'm not really sure it's much ado about
2 nothing when we have Mr. Dondero and his affiliates who,
3 notwithstanding their efforts to just claim that all they are
4 doing is trying to get a fair shake, Your Honor knows better.
5 Your Honor knows better from the years you've been litigating
6 with them, and we know better and the Debtor knows better from
7 what the independent directors have been dealing with.

8 THE COURT: Let me ask you this, though. I came into
9 the hearing with the impression we were just talking about
10 postpetition pre-confirmation, or pre-effective date maybe I
11 should say, was the expanse of time covered by exculpation.
12 And Mr. Rukavina said no, no, no, go back, look at, I don't
13 know, Subsection 4 of something. It is a post-confirmation
14 concept. What is your response to that?

15 MR. POMERANTZ: I believe it's implementation. And,
16 again, --

17 THE COURT: Implementation? Yes.

18 MR. POMERANTZ: -- I think Mr. Rukavina -- right. I
19 think Mr. Rukavina and Mr. Taylor and Mr. Draper have done a
20 great job trying to muddy the issues. They talk about our
21 sleight of hand and how we're trying to do things that are way
22 beyond the bankruptcy court's jurisdiction. We are not. I
23 think they are trying -- what they have done throughout the
24 case is throw up enough mud. And here's, here's the answer to
25 that question, Your Honor. Implementation. Okay? We know

1 what implementation means. The plan says implementation is
2 cancelation of the equity interests, creation of new general
3 partners, restatement of the limited partners, establishment
4 of the Claimant Trust and Litigation Sub-Trust. That's the
5 implementation.

6 We are not trying to get exculpation for post-confirmation
7 activity. Actually, my partner, Mr. Kharasch, in specifically
8 addressing Mr. Rukavina's concern, said, look, if you have a
9 problem with cause, if you have a problem, want to exercise
10 your rights, we're only asking you to come back to the Court.
11 We are not stopping you.

12 So the whole argument that the exculpation is really broad
13 and is not really -- does not really cover just the plan, the
14 approved plan, I think is a red herring. Implementation is
15 implementation in the context of the plan.

16 And also Mr. Rukavina tries to argue that, well, it's
17 administration, it's not really you acting any operation of
18 business. I just don't think there's any support in the case
19 law. Your Honor has overseen this case, overseen this
20 Debtor's activities, overseen the independent directors'
21 activities, overseen Strand's activities, overseen the
22 employees' activities. And those activities have been
23 (indecipherable) administration of the case. And his attempt
24 to create a different category for, well, it's not
25 administration, it's operation and so it doesn't apply, I just

1 think is wrong.

2 Your Honor made a couple of comments about what was
3 *Pacific Lumber* doing. It was a policy decision. If there was
4 a bright-line rule, then nobody would be entitled to
5 exculpation. The very fact that the Fifth Circuit said that
6 Committee members are different made -- makes it clear it was
7 -- it was policy.

8 And Mr. Taylor's comments that, well, their creation of
9 statute, Chapter 11 trustees and Committee members, that's not
10 what basically the case said. If you look at the citation to
11 touters in the case, it was we want people to volunteer and
12 who are needed for the process. Committee members are needed
13 for the process. We don't want to discourage them from coming
14 in. And the only testimony you have on the independent
15 directors is from Mr. Dubel, and he testified the importance
16 of independent directors to modern-day Chapter 11 practice,
17 the importance of exculpation, indemnification, and D&O
18 insurance. And his testimony: uncontroverted. The Objectors
19 could have brought in someone to say something different, but
20 the only testimony before Your Honor is, if Your Honor does
21 not approve exculpations in cases like this, you will not get
22 independent directors and it will have an adverse effect on
23 the Chapter 11 process.

24 So, while I appreciate all the Objectors trying to say
25 bright line, trying to say *Pacific Lumber*, that is the gut

1 reaction, right? That's -- it's easy to say. But Your Honor
2 will know better, from reading the cases, that's not what
3 *Pacific Lumber* says. And for the several reasons I gave, it's
4 the reason why *Pacific Lumber* does not govern the decision in
5 this case.

6 Your Honor, Mr. Draper then started to talk about *Craig*.
7 And everyone cites *Craig* as this, you know, limiting
8 jurisdiction. Now, we acknowledge that *Craig* and the Fifth
9 Circuit has a more limited post-confirmation jurisdiction
10 approach than the other Circuits, but it's not nonexistent.
11 And just because the Debtor is going out post-confirmation and
12 acting does not mean that the conduct that they are engaging
13 in is not -- and disputes that arise, doesn't come within the
14 Court's jurisdiction. If that was the case, and I think Your
15 Honor recognized this, in your case it was the *TXMS* case,
16 while it's limited, more limited after confirmation, and I
17 think you even, in the case -- or, in one case of yours, said
18 that even after the case is closed there could be
19 jurisdiction. So their just trying to argue *Craig* is just --
20 is just too much.

21 Going out of the gatekeeper, Mr. Draper tried to say we
22 are *Barton*, and that's it, and *Barton* has its limitations, et
23 cetera. First of all, with respect to *Barton*, it is not
24 limited and doesn't include debtors-in-possession. We have
25 cited cases in our materials where it has been applied to

1 debtors-in-possession.

2 So, you know, look, maybe this is a provision -- this is a
3 proposition like many in bankruptcy, you could find a
4 bankruptcy court to agree with a proposition, but there's
5 cases all over the place on that. There's cases applying to
6 post-confirmation. The trend has been to expand *Barton*. But
7 the beauty of it is, Your Honor, you don't have to rely on
8 *Barton*. *Barton* was one of our arguments. We gave *Barton* as,
9 you know, somewhat of an analogy but somehow applying because
10 in the -- because the independent directors were like the
11 trustees.

12 But we recognize it may be going farther than *Barton* has
13 previously gone. But the case law is clear, it is being
14 extended. But we -- I gave you several provisions of the
15 Bankruptcy Code that authorized you to enter a gatekeeper
16 order. None of the Objectors objected on any of those
17 grounds. They didn't say the statutes that I cited. And it
18 wasn't only 105, I know bankruptcy practitioners love to cite
19 105, but there were three or four others that I mentioned, and
20 they're in our brief. There's no case that they cited that
21 said that there is no authority on the gatekeeper.

22 But what was the argument that was raised? And I think
23 Mr. Rukavina raised it, saying, you know, look, I don't
24 understand the argument of no jurisdiction, of jurisdiction
25 for a gatekeeper but no jurisdiction for underlying cause of

1 action. Well, Mr. Rukavina should read and Your Honor should
2 read, when you're considering the plan, the case, the *Villegas*
3 case in the Fifth Circuit as it dealt with *Stern*. That was
4 particularly a case. Does *Barton* -- is *Barton* impacted from
5 *Stern*? By *Stern*? And *Stern*, we know, limits the bankruptcy
6 court's jurisdiction. But, no, the Fifth Circuit said, in
7 that case, no. Even though the bankruptcy court's
8 jurisdiction is limited to hear the claim, there is nothing
9 inconsistent with that and allowing the bankruptcy court to
10 act as a gatekeeper.

11 So Mr. Rukavina's argument that, well, he'll present to
12 you that there's cause and you'll find there's no cause and
13 then he will be without a remedy by someone that had
14 jurisdiction, that really sounds good but it just doesn't
15 withstand analytic scrutiny. There is a distinction. They
16 are glossing over the distinction. They don't like the
17 distinction.

18 And why is that distinction -- and why is it important in
19 this case? Again, we're not talking about garden-variety
20 people who are just involved with a debtor and will get caught
21 up in a bankruptcy. We narrowly tailored the gatekeeper to
22 enjoined parties. Enjoined parties are the people before Your
23 Honor, some of the people that have made the Debtor's life
24 miserable over the last few months.

25 We have every interest and desire, as does the Committee,

1 to go out post-confirmation and monetize these assets. But we
2 see the clouds on the horizon. We see all the pleadings that
3 have been filed by the Objectors saying how, if there's no
4 deal, there will be an unending amount of costs and appeals.
5 It's, you know, the point, not too subtle. It wasn't lost on
6 us.

7 Your Honor, going to Mr. Rukavina's arguments on Class 8
8 cram down, again, it's really a hard argument to understand,
9 but first I want to make a point. He sort of mentioned -- and
10 I'm not sure if he intends to preserve this on appeal, but it
11 was not objected to and I'll ask for a ruling on it, Your
12 Honor -- he said that there was inappropriate separate
13 classification. That was not raised in any of the objections.
14 We don't think it was properly before the Court. We
15 understand there's a component of that in unfair
16 discrimination in connection with a cram down, but there is no
17 objection, there was no filed objection, to the separate
18 classification of the deficiency claims and the Class 8
19 unsecured claims.

20 And if you look at the voting, you realize it wasn't done
21 for gerrymandering, because if you put both claims together,
22 both classes together, you would have had one class that voted
23 yes.

24 So I don't believe the separate classification under the
25 1129 standards is appropriate for Your Honor to consider,

1 other than in connection with the cram down.

2 Now, Mr. Rukavina complains that the only way the
3 convenience class was decided was by way of negotiation. Your
4 Honor, how else do provisions like that get decided? And who
5 was the negotiation between? It was between the Committee.
6 And one of the benefits of a Committee process, and I
7 represent a lot of Committees, you put people in a Committee
8 that have diverse interests and they can come up with an
9 appropriate result. And here you have that. You had one
10 creditor who was a convenience creditor. You have three other
11 creditors who would lose liquidity if convenience payments are
12 made.

13 Do you think that UBS, Acis and Redeemer, do you think
14 they had a desire just to pay people off? No. It was part of
15 a collaborative process. So to say that there was no basis
16 and no testimony on the appropriateness to have -- and how the
17 convenience class was put together just would be wrong.

18 And with respect to the absolute priority rule, Your
19 Honor, again, there's a missing link here, okay? These are
20 contingent interests. They are property. No doubt they are
21 property. But if I did not allow those creditors or those
22 equity to have a contingent interest, the argument would have
23 been made that the plan violates the absolute priority rule.
24 And I said that in my argument. And why would it have
25 violated the absolute priority rule? Because there's a

1 potential that creditors could get over a hundred cents on the
2 dollar, plus interest. So it's a game of gotcha, right?

3 And why do they really care? Mr. Dugaboy said in his --
4 Mr. Draper said in his brief that Dugaboy cares because they
5 may have wanted to buy the interest. Well, I'm sure they can
6 go to Hunter Mountain, you know, Mr. Dondero's left hand can
7 go to his right hand, and I'm sure he'd be happy to sell the
8 contingent interests.

9 And with respect to the argument that Mr. Rukavina made
10 about control, equity be in control, yeah, control is a right.
11 No doubt. You've got -- if you're giving control to the post-
12 confirmation Debtor, that could be a right and implicate the
13 absolute priority rule. But what is the control here? Equity
14 is not given any rights. Your Honor heard how the post-
15 confirmation entity is structured. It's going to be Mr.
16 Seery, overseen by an Oversight Board. So I really don't
17 understand the concept of control. There just is no violation
18 of the absolute priority rule.

19 Your Honor, Mr. Rukavina then took us to task for 2000 --
20 or, for not filing the 2015.3 statement. And if you take his
21 argument to the logical conclusion -- well, we didn't file it,
22 we didn't comply with that Rule, so we're not in compliance
23 with the Bankruptcy Code, so we can never basically get our
24 plan confirmed, right, because it's a violation and we didn't
25 file and seek an extension.

1 That's just a preposterous argument, Your Honor. Mr.
2 Seery poignantly told the Court, in the rush of things that
3 were going on, it wasn't filed. Did Mr. Rukavina, before
4 yesterday, having Mr. Dubel on the stand, did he ever ask
5 where is our 2015.3 report? He probably didn't ask it because
6 the answer -- when I told him the reason why it wasn't filed
7 before January 9 was because I don't think Mr. Dondero wanted
8 it filed, and I think that's why, as Mr. Seery testified, we
9 were having a challenging time getting that information from
10 the in-house -- in-house.

11 But, yes, should it have been filed? Yes. But if that is
12 all they could point to through the course of the case that
13 Mr. Seery or Mr. -- or the rest of the board did wrong, you
14 know, I think that just demonstrates they did a fine job.

15 THE COURT: All right.

16 MR. POMERANTZ: Your Honor?

17 THE COURT: You've got four minutes left.

18 MR. POMERANTZ: Oh. Okay. Your Honor, going to Mr.
19 Rukavina and the Strand argument that it's a nondebtor entity,
20 as I explained in my argument, the Strand -- Strand needs to
21 get exculpation or else that's a backdoor way to the Debtor.
22 Forget about the independent directors, it's a backdoor way to
23 the Debtor. Because Mr. Dondero will be in control. If
24 Strand is sued for post-January 9th activities, he will assert
25 an administrative claim. And one thing from *Pacific Lumber* is

1 clear, the Debtor is entitled to an exculpation as part of the
2 injunction and the -- and the discharge.

3 Your Honor, Mr. Kharasch adequately addressed Mr.
4 Rukavina's comments with the gatekeeper and the gatekeeper
5 problem. We are not seeking to stop his clients, however
6 related they may be, from exercising their rights. We are
7 seeking a process that will not embroil the Debtor in
8 litigation going forward. There is no problem with Your Honor
9 acting as the gatekeeper to do so. And to the extent that
10 they are bound by the January 9th order is not really an issue
11 for today. That'll be an issue at the temporary -- the
12 temporary -- at the preliminary injunction hearing.

13 I -- just one minute, Your Honor.

14 (Pause.)

15 MR. POMERANTZ: Your Honor, I think I covered a lot.
16 If there's anything that any of the Objectors have mentioned
17 that I failed to respond to, I'd be happy to answer questions
18 Your Honor has.

19 THE COURT: All right. I guess there's, what, about
20 two minutes left, if Mr. Clemente had anything.

21 Mr. Clemente, have you drifted off? I doubt it. But
22 anything else from you, Mr. Clemente?

23 MR. TAYLOR: Your Honor, I show him talking -- this
24 is Clay Taylor -- but no one's hearing him.

25 THE COURT: Okay. Mr. Clemente, we are not hearing

1 you, or I'm not seeing you. Make sure you're not on mute.

2 THE CLERK: He's not on mute, Judge.

3 THE COURT: He's not on mute? So we must have a
4 bandwidth issue or something else.

5 All right. Mr. Clemente, still not hearing or seeing you.
6 We'll give him another 30 seconds.

7 THE CLERK: He's coming up.

8 THE COURT: He's coming up? Ah, I see his name now.

9 MR. CLEMENTE: Your Honor, can you hear me?

10 THE COURT: I can hear you now.

11 MR. CLEMENTE: Okay, Your Honor. I don't know what
12 happened. I just switched another camera, so you may not be
13 able to see me, but can you hear me? I'll be very quick.

14 THE COURT: Okay. I can hear you.

15 MR. CLEMENTE: Can you hear me?

16 THE COURT: Yes.

17 MR. CLEMENTE: Okay. Thank you, Your Honor.

18 CLOSING ARGUMENT ON BEHALF OF THE UNSECURED CREDITORS' COMMITTEE

19 MR. CLEMENTE: Two things I want to say. First, just
20 on Class 8, I think what's important, as my comments
21 emphasized earlier, the structure of Class 8. We must
22 remember what it is. It's really designed so that Class 8
23 holders receive their pro rata share of what's left after
24 prior claims are paid. That's really what Class 8 creditors
25 voted on. That's what the disclosure provided. They did not

1 vote on receiving a specific dollar or a specific recovery
2 percentage.

3 And regarding the projections and estimates, Your Honor,
4 we're talking about large litigation claims that were asserted
5 and then settled. And given the nature of these assets, the
6 values fluctuate. It's perfectly expected, Your Honor, and
7 indeed disclosed, that there could be wide swings in the
8 amount of claims. That does not lead to the conclusion that
9 the plan needs to be resolicited.

10 And then, finally, Your Honor, again, Mr. Pomerantz
11 adequately addressed all the points, as he did with his
12 earlier presentation, so I'm not going to touch on them, but I
13 did want to respond to one thing that Mr. Taylor said. And I,
14 of course, agree with Mr. Pomerantz. The Committee believes
15 there's no reason for you to delay a ruling and would in fact
16 urge you to rule as soon as Your Honor is ready to rule.
17 Confirmation of the plan, to the extent that there are
18 conversations occurring, is not going to prevent those
19 conversations from taking place, and they can continue after
20 the plan is confirmed. There's simply nothing inherent in
21 Your Honor confirming the plan that would prevent those
22 conversations from occurring or would ultimately prevent
23 parties from pivoting to a deal on the off-chance that one
24 should be reached.

25 So I just wanted to emphasize, Your Honor, again, Your

1 Honor is going to rule when Your Honor rules, but the
2 Committee would urge you to rule, and certainly the idea that
3 there may or may not be discussions with Mr. Dondero should
4 not at all in any way lead you to the conclusion that you
5 shouldn't rule or that those conversations cannot continue
6 after plan confirmation.

7 Thank you, Your Honor. Unless you have questions for me.
8 And my apologies with the technology.

9 THE COURT: No problem. All right. Here's what I'm
10 going to do. We can see you now, Mr. Clemente.

11 MR. CLEMENTE: Oh. I'm sorry, Your Honor. I
12 switched to another camera again because it wasn't working.
13 So, I apologize.

14 THE COURT: All right. I am going to call you back
15 Monday. What day of the week will that be? Is that -- I
16 mean, Monday, what date, I should say. That'll be the 8th,
17 right? I am going to call you back Monday, this coming
18 Monday, February 8th, at 9:30 Central time, and I am going to
19 give you my ruling. It will be a detailed oral bench ruling.
20 And I'm not going to leave you hanging on the edge of your
21 seat over the next few days. I will tell you I'm inclined to
22 confirm this plan. I think it meets all of the requirements
23 of 1129 and 1123 and 1122.

24 The thing that I am going to spend some time thinking
25 about between now and Monday morning is, no surprise, the

1 propriety of the exculpations, the propriety of the plan
2 injunctions, the propriety of the gatekeeper provisions. I
3 certainly am duty-bound to go back and reread *Pacific Lumber*,
4 to go back and read *Thru, Inc.*, and to really think hard about
5 what is happening here.

6 So, I'm pretty much down, I think, to just those three
7 issues here. I'll talk to my law clerk. He may remind me of
8 something else that I'm not articulating right now. But I
9 think I'm just down to those issues. Okay? So it's not going
10 to be a mystery very long. We will come back Monday, 9:30.
11 My courtroom deputy will post on the docket the WebEx
12 connection instructions as usual, and we'll go from there.
13 Now, --

14 MR. POMERANTZ: Your Honor? Your Honor, this is Jeff
15 Pomerantz. I have a question, and it's going to sound odd
16 coming from someone on the West Coast, but I was wondering if
17 you could do it earlier. And the only reason I say that is,
18 the night before, I have to call in to see if I'm on jury duty
19 on Monday, and it would be helpful to me -- I assume your
20 reading the ruling would be within a half hour, 45 minutes.
21 That if you started at 9:00, if that was possible, I could
22 then get in a car, and if I'm actually called to jury duty, I
23 can get there. Of course, I don't know if I will be called,
24 but I'd hate to miss it.

25 THE COURT: Okay. Well, I don't want to make you

1 miss jury duty. Okay. We will do 9:00 o'clock.

2 MR. POMERANTZ: Thank you, Your Honor.

3 THE COURT: Hopefully no one will be, you know, hung
4 over from watching the Super Bowl. Personally, I don't like
5 Tom Brady, so I may be boycotting the Super Bowl. But maybe
6 I'll watch it. Maybe I'll -- I'll watch it. So we'll do it
7 9:00 o'clock. So 9:00 o'clock next Monday.

8 Now, let's talk about next the currently-set hearing this
9 Friday, February 5th, on the injunction and contempt of court
10 motion as to Mr. Dondero and the other entities. I want to
11 continue that, and here is what I am struggling with. The
12 only day I have next week is Friday, the 12th, and I would
13 rather not use that date because I'm pretty jam-packed Monday
14 through Thursday, unless stuff has been settled that I haven't
15 become aware of. So let me ask two things. First, when is
16 the examiner motion set? I'm just wondering if there's a
17 block of time we have coming up that --

18 MR. POMERANTZ: I believe that's March 2nd, Your
19 Honor, so that's not for another month.

20 THE COURT: Oh, that's not for another month? All
21 right.

22 Traci, are you on the line? I want to ask you --

23 THE CLERK: Yes, I am.

24 THE COURT: What about the following week? I know
25 Monday, the 15th, is a federal holiday, but do we have

1 availability for -- I fear a full day is going to be needed
2 for continuing this Friday setting.

3 THE CLERK: Wednesday, February 17th, is available.

4 THE COURT: We've got all day on Wednesday, February
5 17th?

6 THE CLERK: Yes.

7 THE COURT: All right. What about that? I think I
8 heard Mr. Rukavina, I think he's the one who threw it out
9 there -- or maybe it was Mr. Taylor; I'm getting mixed up --
10 the possibility that they would agree to a continuation of the
11 preliminary injunction through -- well, I think you said
12 through confirmation. Until the Court enters a confirmation
13 order. And if I were to rule and approve confirmation Monday,
14 then we're talking about an order that might be entered sooner
15 than the 17th. So, do you all have any --

16 MR. RUKAVINA: Your Honor?

17 THE COURT: -- mutually-agreeable suggestions? If
18 not, I'm just going to set it the 12th and I'll, you know, I'm
19 killing myself, but I'll --

20 MR. TAYLOR: Your Honor?

21 MR. RUKAVINA: No, Your Honor. I think Your Honor is
22 wise to do what's she's proposing. The agreed TRO against my
23 clients expires on the 15th of February.

24 THE COURT: Uh-huh.

25 MR. RUKAVINA: We can easily move that back a week or

1 a sufficient amount of time so that there's no prejudice by
2 going on the 17th, if that would be acceptable to the Debtor,
3 and then we can just pick a date that's sufficiently after the
4 PI hearing so that there's protection for everyone.

5 THE COURT: All right. Mr. Taylor, do you agree?

6 MR. TAYLOR: Yes, Your Honor. That is acceptable to
7 Mr. Dondero.

8 THE COURT: Okay.

9 MR. TAYLOR: We can also push it back. Can you hear
10 me?

11 THE COURT: Yes, I can. Uh-huh.

12 MR. TAYLOR: Okay.

13 THE COURT: All right.

14 MR. POMERANTZ: I just want to make -- I just want to
15 make sure Mr. Morris, John Morris, is on, since he's taking
16 the lead in those matters. I don't see his picture.

17 MR. MORRIS: I am, Jeff, and I appreciate that. I'm
18 available, Your Honor. We were supposed to take the
19 depositions of Mr. Leventon and Mr. Ellington tomorrow. I
20 don't know if their counsel is on the phone. But given Your
21 Honor's decision to adjourn the hearing from Friday, I would
22 respectfully request at this time that counsel for those two
23 individuals work with me to find a date next week in order to
24 take those depositions.

25 THE COURT: All right. That's --

1 MS. DANDENEAU: Debra Dandeneau from --

2 THE COURT: Go ahead.

3 MS. DANDENEAU: This is Debra Dandeneau from Baker
4 McKenzie. We agree, and we're happy to work with you on a
5 rescheduled time.

6 MR. MORRIS: Thank you very much.

7 THE COURT: All right. All right. So, someone had
8 filed a motion to continue Friday's hearing. I think it was
9 your firm, Mr. Taylor. I already had a motion pending for a
10 few days now. So I'm going to direct you to upload an order,
11 Mr. Taylor, or someone at your firm, continuing the hearing to
12 the 17th at 9:30, with language in there that your -- the
13 injunction is continuing at least through that date. And,
14 again, it's a continuance of the motion for contempt as well
15 as the setting on the preliminary injunction. And, of course,
16 run that by Mr. Morris and Mr. Rukavina.

17 MR. TAYLOR: Sure. Your Honor, this is -- I'm not
18 handling the injunction hearing, or at least I don't think I
19 am. But just so that I'm clear, should maybe the injunction
20 continue through the next day or something, so depending on
21 how Your Honor rules, there's not a rush to try and get an
22 order to you?

23 MR. RUKAVINA: Your Honor, I think that Mr. Morris
24 and I can work this out. Mr. Taylor is not involved in that
25 adversary, that's true, but Mr. Morris and I will be able to

1 very quickly enter a proposed agreed order that extends that
2 TRO for some period of time.

3 THE COURT: Okay.

4 MR. RUKAVINA: I'm not going to be difficult.

5 THE COURT: Okay. So we'll shift to you and Mr.
6 Morris to be the scriveners. I just -- I suggested that
7 because I thought there was a motion to link the order to that
8 had been filed by Bonds Ellis. I may be --

9 MR. MORRIS: There was, Your Honor. There was an
10 emergency motion to continue. We filed an opposition, and
11 Your Honor has not yet ruled on that motion. You're exactly
12 right.

13 THE COURT: Okay. All right.

14 MR. TAYLOR: Your Honor, this is Clay Taylor. I will
15 make sure the right people confer with Davor and John, and
16 we'll get -- we'll link it to that motion, because that makes
17 sense, to have something to link it to.

18 THE COURT: Okay. Yes. And it can be a two-
19 paragraph order, I would think.

20 All right. And then so I'm going to see you Monday at
21 9:00 o'clock Central time with the ruling.

22 Please, don't anyone file anymore paper. I threw that out
23 earlier today. I've got all the paper I need. And I will see
24 you Monday at 9:00 o'clock. Okay? We're adjourned.

25 MR. POMERANTZ: Thank you, Your Honor.

1 THE CLERK: All rise.

2 MR. MORRIS: Thank you, Your Honor.

3 (Proceedings concluded at 4:34 p.m.)

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CERTIFICATE

21 I certify that the foregoing is a correct transcript from
22 the electronic sound recording of the proceedings in the
above-entitled matter.

23 **/s/ Kathy Rehling**

02/05/2021

24

25 _____
Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

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